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UNITED STATES REPORTS

VOLUME 250

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1918

AND

OCTOBER TERM, 1919

FROM MAY 19, 1919, TO NOVEMBER 17, 1919

ERNEST KNAEBEL

REPORTER

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.[1]

EDWARD DOUGLASS WHITE, CHIEF JUSTICE.
JOSEPH McKENNA, ASSOCIATE JUSTICE.
OLIVER WENDELL HOLMES, ASSOCIATE JUSTICE.
WILLIAM R. DAY, ASSOCIATE JUSTICE.
WILLIS VAN DEVANTER, ASSOCIATE JUSTICE.
MAHLON PITNEY, ASSOCIATE JUSTICE.
JAMES CLARK McREYNOLDS, ASSOCIATE JUSTICE.
LOUIS D. BRANDEIS, ASSOCIATE JUSTICE.
JOHN H. CLARKE, ASSOCIATE JUSTICE.

A. MITCHELL PALMER, ATTORNEY GENERAL.[2]
ALEXANDER C. KING, SOLICITOR GENERAL.
JAMES D. MAHER, CLERK.
FRANK KEY GREEN, MARSHAL.

[1] For allotment of The Chief Justice and Associate Justices among the several circuits see next page.

[2] Mr. Palmer's nomination was received by the Senate May 29, 1919, and confirmed August 29, following. He took the oath thereunder September 10, 1919.

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES, OCTOBER TERM, 1916.[1]

ORDER: There having been an Associate Justice of this court appointed since the adjournment of the last term,

It is ordered, That the following allotment be made of the Chief Justice and Associate Justices of this court among the circuits agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz:

For the First Circuit, OLIVER WENDELL HOLMES, Associate Justice.

For the Second Circuit, LOUIS D. BRANDEIS, Associate Justice.

For the Third Circuit, MAHLON PITNEY, Associate Justice.

For the Fourth Circuit, EDWARD D. WHITE, Chief Justice.

For the Fifth Circuit, J. C. MCREYNOLDS, Associate Justice.

For the Sixth Circuit, WILLIAM R. DAY, Associate Justice.

For the Seventh Circuit, JOHN H. CLARKE, Associate Justice.

For the Eighth Circuit, WILLIS VAN DEVANTER, Associate Justice.

For the Ninth Circuit, JOSEPH MCKENNA, Associate Justice.

October 30, 1916.

[1] For next previous allotment see 241 U. S., p. iv.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1918.

PORTSMOUTH HARBOR LAND & HOTEL COMPANY ET AL. *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 381. Argued May 1, 1919.—Decided May 19, 1919.

Additional discharges of projectiles over part of plaintiff's land, *held* not to involve a taking of property. *Peabody* v. *United States*, 231 U. S. 530.
Applications for remand and for additional findings denied.
53 Ct. Clms. 210, affirmed.

THE case is stated in the opinion.

Mr. John Lowell, with whom *Mr. Frank W. Hackett* was on the brief, for appellants.

Mr. Assistant Attorney General Brown, with whom *Mr. Charles H. Weston* was on the brief, for the United States.

Memorandum opinion by THE CHIEF JUSTICE.

Recovery was sought in the court below from the United States for property taken by it as the result of the alleged firing of guns in a fortification on the coast of Maine and the passing of the projectiles over and across

a portion of the land alleged to have been taken. The court finding that a former case by it decided against the owners and here affirmed (*Peabody* v. *United States*, 231 U. S. 530), for taking of the same land resulting from instances of gun fire resulting from the same fort and guns, was identical with this, except for some occasional subsequent acts of gun fire, held that case to be conclusive of this and rejected the claim on the merits.

Coming to consider this action of the court in the light of the findings by it made, we are constrained to the conclusion that it was right and that no possible difference exists between this and the *Peabody Case*. Before applying this conclusion we say that we find that the record discloses no ground for the applications here made to remand and for additional findings.

Judgment affirmed.

AMERICAN FIRE INSURANCE COMPANY *v.* KING LUMBER & MANUFACTURING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

No. 308. Argued April 22, 1919.—Decided May 19, 1919.

A fire insurance company transacting business in a State other than that of its incorporation is bound, in respect of such business, by the laws of the State where the business is transacted. P. 9.

A Pennsylvania fire insurance corporation, through a series of years issued a succession of policies on property in Florida, the business being done through local brokers who applied for the insurance, received and transmitted the premiums, drew their commissions from the company and were consulted by it as to the subject-matter insured and the other companies carrying insurance thereon. The policies, executed in Pennsylvania and sent to the brokers by mail, each contained a warranty for concurrent insurance throughout its term in another specified company, but, with the knowledge

of the brokers, a different company was substituted before the loss occurred. A law of Florida in existence throughout the transactions made any person who solicits insurance or procures applications therefor the agent of the insurer, anything in the application or policy to the contrary notwithstanding, and made one who receives or receipts for money from the insured to be transmitted to the insurer the agent of the latter "to all intents and purposes." *Held*, that, as applied to the case, so as to charge the company with the brokers' knowledge and effect a waiver of the warranty, the Florida law did not deny full faith and credit to the laws of Pennsylvania, or violate the privileges and immunities, due process, or equal protection clauses of the Fourteenth Amendment. *Id. New York Life Insurance Co.* v. *Head*, 234 U. S. 149, and *Mutual Life Insurance Co.* v. *Hilton-Green*, 241 U. S. 613, distinguished.

In the interest of justice the court may decide the merits without passing on a motion to dismiss that depends on a disputed proposition involving the merits. P. 14.

74 Florida, 130, affirmed.

THE case is stated in the opinion.

Mr. Gustavus Remak, Jr., with whom *Mr. James F. Glen* was on the briefs, for plaintiff in error, made the following points:

No question as to the power to annex conditions to the right of a foreign corporation to do business in Florida is involved, because the law attacked applies alike to individuals, firms, and corporations, domestic and foreign.

The Florida court refused to accept the construction placed upon the statute by this court in *Mutual Life Insurance Co.* v. *Hilton-Green*, 241 U. S. 613, and the constitutionality of the act must be determined in view of the construction put upon it by the Florida court.

The construction of the statute by the Florida court conclusively makes the agent of an insured, who effects insurance for him, the agent of the insurer, with unlimited authority to bind the insurer, and forbids inquiry into the facts, in violation of § 1 of the Fourteenth Amendment.

Where matter of fact necessarily inheres in a cause of action, concerning which there is dispute, no statute can conclusively settle this matter of fact in favor of one class of litigants against another class.

It is one thing to attribute effect to the convention of the parties entered into under the admonition of the law, and another thing to give to circumstances, may be accidental, conclusive presumption, as proof establishing a result against property and liberty. *Orient Insurance Co.* v. *Daggs*, 172 U. S. 566.

No Florida statute could operate on contracts effected in Pennsylvania by a Pennsylvania insurance company not doing business in Florida. Particularly could it not operate *in invitum* to make strangers agents of a foreign insurance company.

The policies were declared upon as Pennsylvania contracts, and were Pennsylvania contracts.

In case of doubt, parties are presumed to contract with reference to a law that will sustain their contracts in their entirety.

The provisions of the policies conclude the whole controversy if they are given effect.

Isolated transactions do not constitute doing business by a foreign corporation.

The Florida statute never was intended to raise special agents with limited authority into general agents.

The only cases tending to sustain the decision of the Florida court are *Stanhilber* v. *Insurance Co.*, 76 Wisconsin, 285, and *Brewing Co.* v. *Insurance Co.*, 95 Iowa, 31, decided in 1890 and 1895, respectively, and necessarily overruled by *Allgeyer* v. *Louisiana*, 165 U. S. 578, decided in 1897.

All the other cases cited by the Florida court belong to two classes: (1) Cases denying recovery on assessment policies, in favor of the insurer, on the ground they violated the policy of the law in the States where they were

sought to be enforced, which obviously are not authorities to support recovery by the insured, and (2) cases holding that a foreign insurance company doing business in another State through authorized agents submits itself to the laws of that State, which obviously have no application.

The request for information as to the property insured and the insurance thereon was a necessary incident in effecting the contract, which could not make the agents of the insured agents of the insurer.

The allowance of the usual broker's commission was immaterial.

The ultimate analysis is that a Florida statute could not be applied to the contracts of a Pennsylvania company that never left its domicile in Pennsylvania so as to subject itself to the laws of Florida.

Mr. Benj. Micou, with whom *Mr. John H. Treadwell* and *Mr. E. D. Treadwell* were on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action on two fire insurance policies issued by plaintiff in error, to which we shall refer as the insurance company, to defendant in error, to which we shall refer as the lumber company. Each policy was for the sum of $2,500. There was total insurance on the property described in the policies of $45,750, and it was provided that the insurance company should only be liable for its pro rata share of any loss caused by fire under the provisions of the policies. The loss to the lumber company was $21,028.17, and the insurance company's pro rata share was on each policy $1,149.08.

There is not much dispute about the facts. There

is considerable dispute about the inferences from them, and facts and inferences were presented in a maze of pleadings which terminated in a demurrer to a rejoinder by the insurance company to replications of the lumber company to the pleas of the insurance company to the declaration in the case.

The court, in passing upon the demurrer, being of the view that § 2765 of the General Statutes of Florida (*infra*) was applicable, rendered judgment accordingly for the lumber company on the policies for the sum of $2,298.16, with interest at 8% from February 16, 1913, and the sum of $300 as a reasonable attorney's fee. The Supreme Court of the State affirmed the judgment.

The controversy is not especially complicated of itself, but it is made somewhat so by the manner of its presentation. The form and issue of the policies and the fact of fire and loss by it are not in dispute. The controversy centers in the relation of a particular firm of insurance brokers, residing at Tampa, Florida, to the insurance company and the lumber company, whether they were the agents of the former or of the latter under § 2765 of the statutes of Florida and whether they could dispense with the requirement of a clause in the policies called the warranty clause. That clause, therefore, and § 2765 (and, we may say, also § 2777, the Supreme Court of the State taking it into account) become essential elements of decision, and we exhibit them immediately.

Section 2765 is as follows:

"Any person or firm in this State, who receives or receipts for any money on account of or for any contract of insurance made by him or them, or for such insurance company, association, firm or individual, aforesaid, or who receives or receipts for money from other persons to be transmitted to any such company, association, firm or individual, aforesaid, for a policy of insurance, or any renewal thereof, although such policy of insurance is not

signed by him or them, as agent or representative of such company, association, firm or individual, or who in any wise, directly or indirectly makes or causes to be made, any contract of insurance for or on account of such insurance company, association, firm or individual, shall be deemed to all intents and purposes an agent or representative of such company, association, firm or individual."

Section 2777 is as follows:

"Any person who solicits insurance and procures applications therefor shall be held to be an agent of the party issuing a policy upon such application, anything in the application or policy to the contrary notwithstanding."

The warranty clause reads: "Warranted same gross rate terms and conditions as and to follow the American Central Ins. Co. of St. Louis, Mo., and that said Company has, throughout the whole time of this policy at least $5,000 on the identical subject matter and risk and in identically the same proportion on each separate part thereof; otherwise, this policy shall be null and void."

The clause was not complied with. The lumber company carried concurrent insurance, but not in the Missouri company. The omission and substitution, it is alleged, were at the suggestion of Lowry and Prince, of Tampa, Florida, who were the agents of the insurance company and who, as such agents, caused and procured the lumber company to renew its policies from time to time, and finally the company, at the suggestion of Lowry and Prince, substituted other policies for policies in the Missouri company, with the knowledge of the insurance company, such other companies being equal in credit and responsibility to the Missouri company.

To these assertions the insurance company opposed contentions of law and fact, not, however, by any one pleading. The following are the facts it alleged, stated

narratively: The insurance company is a Pennsylvania corporation authorized to write and issue policies on property outside of Pennsylvania. Lowry and Prince, as brokers of the lumber company, applied for it (the lumber company) to the insurance company for insurance upon the lumber company's property. Policies were issued, and upon subsequent application policies were continued to be issued, including those in suit. They were executed in Philadelphia and delivered to Lowry and Prince by mail. They each contained a warranty such as has been set out as to the existence of concurrent insurance with an approved and designated company doing business in Florida, the names of the companies being changed from time to time at Lowry and Prince's request, and finally the name of the American Central Insurance Company of St. Louis, Missouri, being inserted, the ground of the request being that they were the agents of that company and would know of any cancellations by it. Lowry and Prince were not agents of the insurance company nor authorized "to represent it in any manner, shape or form," but as agents of the lumber company transmitted to the insurance company at its main office in Philadelphia the original and subsequent applications for policies, and as such agents received by mail the policies and transmitted the amount of premiums to the company less the usual brokers' commissions.

Besides statement of the above facts the rejoinder contained the following denials: That by issuing the policies to the lumber company the insurance company was engaged in the transaction of business in the State of Florida; that the lumber company paid Lowry and Prince, for the insurance company, any premiums on the policies; that Lowry and Prince were its agents; that prior to the furnishing of the proofs of loss by the lumber company the insurance company had any notice or

knowledge that the Missouri company had canceled its policies on the property insured and did not carry $5,000 on the identical subject-matter and risk; or that it advised or consulted with Lowry and Prince as to the advisability of the risk or otherwise, except to the extent that it did request information from them as to the subject-matter insured and as to the companies carrying insurance thereon.

It will be observed that the rejoinder raised no question under the Constitution of the United States. That was done by a demurrer to the replications of the lumber company and was expressed, in effect, as follows: "The legal predicate for the conclusion that Lowry and Prince were the agents of the defendant [the insurance company] rests upon § 2765 of the General Statutes of Florida" and, further, if the section be so construed it violates (a) the full faith and credit clause of the Constitution of the United States in that the State of Florida would thereby deny full faith and credit to the laws of the State of Pennsylvania, and so construed, it violates (b) the privilege and immunities clause, the due process clause and the equal protection clause of the Fourteenth Amendment.

Some other matters were set forth in the demurrer which we think are not material to mention. They only express what is expressed in other places, that Lowry and Prince were not the agents of the insurance company but were and must be considered as agents of the lumber company; and alleged that the policies were Pennsylvania contracts, complied with the Pennsylvania law, and that to construe them as the lumber company contends they should be construed would be to deny that law full faith and credit.

The ultimate question, then, is the relation in which the insurance brokers stood to the respective companies. The case would seem, therefore, not to be of broad compass nor to justify the elaborateness of argument that

has been addressed to it. We certainly do not consider a review of the many cases cited by the insurance company necessary to be made.

The Florida law first demands attention. It is explicit in its declaration. It was in existence when the policies were executed, and when the policies of which they are the successors were executed. There was, therefore, a course of conduct and transactions through a succession of years—not a single instance or an isolated one, as the insurance company contends, but a number of instances and all in relation. Nor does the case present an attempt of the Florida law to intrude itself into the State of Pennsylvania and control transactions there; it presents simply a Pennsylvania corporation having the permission of that State to underwrite policies on property outside of the State and the exercise of the right in Florida. And necessarily it had to be exercised in accordance with the laws of Florida. There was no law of Pennsylvania to the contrary—no law of Pennsylvania would have power to the contrary. There is no foundation, therefore, for the contention that full faith was not given to a law of Pennsylvania, nor of a denial of a right to a citizen [1] of Pennsylvania, nor of a denial of due process or the equal protection of the law.

The law of Florida, it is true, puts an element into the transactions of the parties to insurance and makes the person who solicits insurance and procures applications the agent of the party issuing the policy, and this against any provision in the policy to the contrary. And, even farther, the law makes the person who receives or receipts for money from the insured to be transmitted to the insurer the agent of the latter.

[1] A corporation is not a citizen within the meaning of the provision of the Constitution which secures the privileges and immunities of citizens against state legislation. *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557–561.

There is nothing unreasonable in the conditions; they regulate the transactions, do not prevent them, or even embarrass them by ambiguity. A company is informed what it may incur by underwriting insurance in the State, and it cannot assert surprise or ignorance—certainly the insurance company in the present case cannot do so. It had knowledge or must be charged with knowledge of the law. It dealt through Lowry and Prince during a succession of years, permitted them to receive and receipt for premiums and transmit them to it, and consulted with them about the subject-matter and with what companies the risk was divided. It accepted the benefit of their action while premiums were being received and new policies were being issued. It is rather late to reject the consequence. Indeed, the attempt at rejection suggests the possibility of the occurrence of examples of like kind and may indicate the reason for the enactment of the law—suggest that its purpose was to preclude confusion and dispute as to the relation of the broker to the parties respectively, and to preclude an underwriter, after using the agency, from denying responsibility.

These deductions are not contravened by the cases cited by the insurance company. Its basic proposition is that a State has no jurisdiction of persons or property beyond its borders or of contracts executed beyond its borders, and it invokes the proposition by the assertion that the policies were Pennsylvania contracts and being such were immune from regulation by Florida, and *New York Life Insurance Co.* v. *Head*, 234 U. S. 149, is adduced as typical. In that case the principle was expressed that the laws of a State could not be extended beyond its confines, and it was concretely applied in the case to deny to the State of Missouri the right to extend its authority into the State of New York and there forbid a citizen of New Mexico and a citizen of New York from

making a loan agreement in New York simply because it modified a contract originally made in Missouri. The difference between that case and this is manifest, and the other cases relied on are not nearer in point. The Florida statute does not attempt to invade Pennsylvania and exercise control there. It stays strictly at home in this record and regulates the insurance company when it comes to the State to do business with the citizens of the State and their property.

It is true the insurance company contends that its transactions were all isolated ones, not such as to constitute doing business in the State, and, besides, that it had no permission to be in the State and could not be presumed to be there against its laws; and, besides, again, its policies declared that they were to be effective in Pennsylvania. Cases are cited which are assumed to support these contentions. A review of them is unnecessary. The contentions confuse a simple situation and would withdraw from the jurisdiction of Florida transactions there and give them another theatre and another control. In other words, would displace the law by the very things it precludes from such operation.

The challenging response of the insurance company is that to give the law that effect is to bring it under the condemnation of *Mutual Life Insurance Co.* v. *Hilton-Green*, 241 U. S. 613. That case considered the Florida law, but did not deny its legality nor decide that the State could not make the local broker, if the designated conditions existed, the agent of an underwriter. It only decided that the knowledge of the agent of misrepresentation and fraud by the insured could not be imputed to the underwriter. It was naturally held that such imputation was a perversion of the rule which imputes an agent's knowledge to his principal and its underlying reason "that an innocent third party may properly presume the agent will perform his duty and report all facts which affect

the principal's interest." To so extend the law would be a perversion of it, not a use to it—make it not a regulation but an oppression. The present case is not open to that condemnation. The lumber company was an "innocent third party" and could properly presume that Lowry and Prince would and did perform their duty and report to the insurance company their knowledge of the concurrent insurance that was carried on the property, and that the provision requiring it was equivalently complied with. And there was not dereliction in the agents; the substituted security was not insufficient. If the power that was exercised had no binding effect on the insurance company it would be difficult to imagine what would have under the Florida statute. Nor can we yield to the contention that to so construe it is "to raise special agents with limited authority into general agents."

The insurance company, however, insists that the policies constituted the contracts between it and the lumber company and that they were not subject to subsequent variation, and *Lumber Underwriters* v. *Rife*, 237 U. S. 605, is cited. The case is not apposite. There was an attempt, in that case, to vary the written words of a contract by a concurrent parol agreement; in other words, and to quote those of the case, to establish by "parol proof that at the very moment when the policy was delivered" one of its provisions was waived. It was not decided that there could not be a subsequent waiver of a provision of a policy nor that the convention of the parties could not be made subject to a law of the State.

Finally the insurance company contends that the Florida law, as aided by the decision of the Supreme Court of the State, gives "the agent of the insured unlimited authority to bind the insurer, and forbids inquiry into the facts, in violation of § 1 of the 14th Amendment." Phases of the contention are covered by what we have said, and its main foundation that inquiry into the facts is forbidden

is not tenable. The facts were exhibited in the pleadings and they showed that the conditions for the application of the law existed. They showed insurance effected through the brokers, Lowry and Prince, their communication with the insurance company, their transmission of money to it, the payment of their commission by the company, and the consultation of the company with them as to the "subject matter insured, and the companies carrying insurance thereon," to use the language of the rejoinder.

A motion to dismiss is made on the ground that the federal questions raised were not passed upon by the courts of the State, but that the courts rested their decision on the fact that the contracts were made in Florida rather than in Pennsylvania. That, however, was a disputed proposition and the motion so far involved the merits of the case that we have considered, under such circumstances, justice would be better served by going into the merits. *Beaumont* v. *Prieto*, 249 U. S. 554.

Judgment affirmed.

CALDWELL ET AL., COPARTNERS, TRADING AS CALDWELL & DUNWODY, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 325. Submitted April 23, 1919.—Decided May 19, 1919.

The provision of the General Railroad Right of Way Act of March 3, 1875, granting a beneficiary railroad company the right to take from the public lands adjacent to its line timber necessary for the construction of its railroad, must be strictly construed, and does not permit that portions of trees remaining after extraction of ties be appropriated, either as a means of business or profit or to compensate the agents employed by the railroad to do the tie-cutting. P. 19.

A grant of "timber" for purposes of railroad construction is not a grant of "trees." P. 21.

14. Argument for Appellants.

Section 8 of the Act of March 3, 1891, c. 561, 26 Stat. 1099, enacting that, in proceedings growing out of trespasses on public timber lands in Colorado and some other States, it shall be a defense that the cutting or removal was by a resident of the State for agricultural, mining, manufacturing or domestic purposes, under rules of the Interior Department, etc., but providing that nothing in the act contained shall operate to enlarge the rights of any railway company to cut timber on the public domain, gives no protection to persons who, having cut ties as agents of a railroad company under the Act of March 3, 1875, *supra*, seek to appropriate the remaining tops of the trees cut, for the purpose of sale. P. 21.

The right to take timber granted by the Act of March 3, 1875, *supra*, cannot be enlarged by a permission from an official of the General Land Office. P. 22.

53 Ct. Clms. 33, affirmed.

THE case is stated in the opinion.

Mr. William C. Prentiss for appellants:

Under various laws and conditions similar situations have been presented and uniformly, wherever a right to cut or take timber has been recognized, the right to dispose of it as incidental to its cutting or taking has followed. *United States* v. *Cook*, 19 Wall. 591; *Shiver* v. *United States*, 159 U. S. 491; *Stone* v. *United States*, 167 U. S. 178; 27 L. D. 366; 30 L. D. 88.

In all of these instances the right to cut the timber is raised as an incident and carries with it the vesting of title in the occupant to timber so lawfully cut. The right of a railroad company to take timber for construction purposes is an express grant. Taking "timber necessary for the construction of its railroad" contemplates the taking of trees. In the United States statutes the word "timber" used collectively signifies standing trees. 28 Enc., 2d ed., 537, and cases cited.

In the absence of any express provision as to the disposition of lops and tops or other surplus, the principles recognized in the cases of Indian occupants, homesteaders,

and mineral claimants furnish the only reasonable solution.

The Land Department, in its regulations under this act and the Act of June 3, 1878, authorizing the taking of timber from mineral lands (see 8 Copp's Land Owner, p. 94; 9 *id.* p. 100; 4 L. D. 150; Land Office Annual Report, 1886, pp. 446, 451, 453), did not undertake to make any declaration as to the ownership of the tops and lops of trees, but merely made provisions against waste and in avoidance of fire. It evidently regarded the tops, lops and brush all as refuse, which, if not removed, should be piled and burned.

The Land Department could lawfully authorize the taking of the lops and tops in consideration of careful piling of the brush so as to minimize the danger of forest fires, even if the lops and tops did not pass to the railroad company as part of the "timber" which it was authorized to take.

To permit the railroad companies to use the surplus tops, lops, etc., as an element in adjusting the compensation of agents employed to fell the trees and manufacture therefrom the lumber required for construction purposes, is promotive of the policy of the act and in accord with the general policy of the Government.

And final recognition by the Land Department that the right to dispose of "refuse" or "surplus" is incidental to the right to take timber for railroad construction purposes, is evidenced by the instructions of the Commissioner to the Chief of Field Service at Denver. A comparison of the language of the several acts authorizing the taking of timber from the public lands (Rev. Stats., § 5264; Acts of 1875, 1878, 1891,) shows that they contemplate the taking of trees themselves and in none of them is any notice taken of any surplus not available for the purposes specified. See Land Office Report for 1887, p. 480.

[Counsel here analyzed and criticised the opinion of the

District Court in *United States* v. *Denver & Rio Grande Ry. Co.*, 190 Fed. Rep. 825, in comparison with the earlier opinion of the Circuit Court of Appeals in the same case, 124 *id.* 159.]

It is alleged in the amended petition that the lands where the timber was cut were designated for the purpose by the Commissioner of the General Land Office, through the Chief of Field Service, and that the tie slash was to be utilized for the purposes specified in the Act of 1891 and within the State of Colorado, thus bringing the case clearly within that act. *United States* v. *Lynde*, 47 Fed. Rep. 297.

The opinion of Assistant Attorney General Van Devanter, of November 27, 1899 (29 L. D. 322), to the effect that this act does not authorize the sale of timber, went only to sale of timber by the Secretary of the Interior under assumed authority of the act.

The regulations of 1900 (29 L. D. 571, 572) declared that the Act of 1891 (as well as the Act of 1878) did not authorize the cutting of timber for sale to others. But in 1904 the Circuit Court of Appeals for the Ninth Circuit, in *United States* v. *Rossi*, 133 Fed. Rep. 380, held that such attempted restriction of the Act of 1878 was beyond the power of the Land Department; and in 1905 this court, in *United States* v. *United Verde Copper Co.*, 196 U. S. 207, applied the same principle in declaring void the provision of the same regulations declaring that timber could not be cut for smelting purposes.

Mr. Assistant Attorney General Frierson for the United States.

Mr. Justice McKenna delivered the opinion of the court.

This action was brought by appellants to recover the value of certain timber cut from the public lands of the

United States in the State of Colorado, called "tie slash" or "tie slashing," the term being used to describe the tops of trees the bodies of which have been used for making railroad ties.

The right of recovery is based upon contracts with the Denver, Northwestern & Pacific Railway Company, which had been given the right to cut timber upon the public lands adjacent to the line of its road by the Act of Congress of March 3, 1875, c. 152, 18 Stat. 482.

The Court of Claims sustained a demurrer to the petition and dismissed it. To review that action this appeal has been prosecuted.

Appellants were, in June, 1906, by due appointment of the railway company, its timber agents, to cut timber from the public lands for construction of the railroad under the act of Congress. And by agreement with the company they were given all of the "tie slash" of the trees cut down for the purpose. Pursuant to the contract, and prior to October, 1906, they manufactured and delivered to the company 88,797 ties, which left a large amount of "tie slash."

By a letter from one N. J. O'Brien, describing himself as "Chief, Field Division, G. L. O.," and expressed to be by instructions from the Commissioner of the General Land Office, there was granted to appellants authority to cut timber under the act of Congress and "to sell and dispose of tops and lops of trees that" they "may cut for construction" of the road which could not be used for road construction purposes. Inquiry first was to be made of the officers of the railway company if they would purchase the tops and lops appellants had on hand.

The letter contained a ruling of the Land Office that contractors should confine their cutting strictly to such timber as was needed by the railway company and that such "refuse" as resulted from such cutting might "be

disposed of by the railroad company or by the contractors without violation of existing law." A violation of the law, it was stated, would require a notice to the company to nullify the contract and agency and would subject the contractors to be proceeded against "as in ordinary cases of timber trespass."

Thereafter appellants entered into another contract with the company under which they manufactured additional ties and delivered them to it, and a further amount of "tie slash" was left. A large amount of this appellants agreed to sell to the Fraser River Timber Company, of Denver, Colorado, and to the Leyden Coal Company, of the same place, they sold 200 cars of mining props cut by them from the "tie slash," all to be used in the State of Colorado.

March 2, 1907, the land from which the ties had been cut was by presidential proclamation included in the Medicine Bow National Forest and the officers of the Forest Service permitted appellants to remove the poles already cut from the "tie slash" and also to have all of tops and refuse on the so-called "fireguard" 200 feet wide along the railway for a distance of two miles, but refused to allow them to have any of the remainder of the "tie slash," and took possession of and sold it; and the proceeds were covered into the Treasury of the United States. To recover the sum of the proceeds thus covered into the Treasury, or such other amount as might be found to have been received by the United States from such sale, this action was brought.

The elements for consideration are not many. The first of these is the Act of 1875, *supra*. It grants a right of way to the railway company [the grant is to railroad companies of a certain description—we make it particular for convenience] through the public lands of the United States to the extent of 200 feet on each side of its central line, and the right to take from the public lands

adjacent to its line " . . . timber necessary for the construction of said railroad." The right given is to take "timber" and this, it is argued, necessarily means "trees," and as there is no provision for disposition of what shall be left of them after using such portions for railroad purposes, it must be determined by "reason and analogy," and from these appellants argue that the railway company was entitled to the "tie slash" as incident to its right to cut under the act of Congress. They adduce *United States* v. *Cook*, 19 Wall. 591; *Shiver* v. *United States*, 159 U. S. 491; *Stone* v. *United States*, 167 U. S. 178.

The instances of the cases, however, are not in analogy to that of the case at bar. In the first the right was given to Indians as a legitimate use of land reserved by them from the cession of a larger tract to the United States, the right of use and occupancy being unlimited. The second case involved the cutting and sale of timber by a homesteader and they were considered a use of the land, his privileges with respect to standing timber being analogous to those of a tenant for life; the third case was of like kind, and the other two cases were cited. Other cases referred to by appellants struggled with the problem without solving it and we need not review or comment upon their reasoning nor consider some state cases.

The contention of appellants encounters the rule that statutes granting privileges or relinquishing rights are to be strictly construed; or, to express the rule more directly, that such grants must be construed favorably to the Government and that nothing passes but what is conveyed in clear and explicit language—inferences being resolved not against but for the Government. *Wisconsin Central R. R. Co.* v. *United States*, 164 U. S. 190; *United States* v. *Oregon & California R. R. Co.*, 164 U. S. 526. And the Government invokes the rule in the present case and cites in implied support of the invocation *United States* v. *Denver & Rio Grande Ry. Co.* 150 U. S. 1, and in express

support of it *United States* v. *Denver & Rio Grande Ry. Co.*, 190 Fed. Rep. 825, 828. And these cases were cited by the Court of Claims for its judgment.

The rule, it seems to us, is particularly applicable. There was a grant of timber by the Act of March 3, 1875, not of trees, but of timber for purposes of railroad construction, not as a means of business or of profit; nor could it be made an element, as contended, of compensation to the agents employed to cut it.

Appellants invoke the Act of March 3, 1891, c. 561, 26 Stat. 1095, 1099, in justification and as giving them a right independently of their asserted right derived through the railway company. Section 8 of that act provides that in criminal prosecutions for trespass on public timber lands in Colorado (and some other States) or to recover timber or lumber cut, it shall be a defense to show that the timber was cut or removed from the lands for use in the State by a resident thereof for agricultural, mining, manufacturing or domestic purposes under the rules of the Interior Department, and has not been transported out of the State. But it is provided that nothing in the act contained shall operate to enlarge the rights of any railway company to cut timber on the public domain, and there are other provisions giving the Secretary of the Interior the power to designate the tracts from which the timber may be cut or to prescribe the rules and regulations for the cutting.

We think it is clear that appellants are not within the provisions of the act. They are not and were not in the designated classes nor contemplated the uses which the act protects. They were agents of the railway company for so much of the timber as was to be used in railroad construction; of what was left they were simply vendors for profit. To enable them to so use the act or to use it for any but the designated purposes would be a violation of that provision of the act which forbids its operation

"to enlarge the rights of any railway company to cut timber on the public domain"; it would make the act available to a railroad as a means of profit or other purpose than road construction. And its value would be a temptation to do so. In this case it is alleged that the value of the "tie slash" that the officers of the Forest Service took possession of (it was only part of that which was cut) "was, and is, $26,454.90."

Finally, appellants rely upon the letter of the Chief, Field Division, General Land Office, *supra*. The immediate answer is that made by the Court of Claims: the want of power in the officer to enlarge the Act of March 3, 1875, and to give rights in the public lands not conferred by it.

Judgment affirmed.

MR. JUSTICE MCREYNOLDS took no part in the decision.

TAYABAS LAND COMPANY, ASSIGNEE AND SUCCESSOR OF VELASQUEZ ET AL., *v.* MANILA RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 331. Argued April 25, 1919.—Decided May 19, 1919.

Under §§ 246, 273, 496 and 497 of the Code of Civil Procedure of the Philippine Islands, the Supreme Court of the Islands may review the evidence touching the amount of an award reported by commissioners and accepted by the Court of First Instance in a condemnation case, and may find a different amount upon a preponderance of the evidence and modify the judgment accordingly if a motion for new trial has been made and exceptions taken as provided in the last-mentioned section. P. 24.

This court will accept a construction placed by the Supreme Court of the Philippine Islands upon a local statute, if not clearly erro-

neous, and will assume that that court duly considered and weighed the testimony and commissioners' report on the facts. P. 27.

This court cannot examine questions of fact in a case coming from the Philippine court on writ of error. *Id.*

32 Phil. Rep. 286, affirmed.

THE case is stated in the opinion.

Mr. David A. Baer, with whom *Mr. A. S. Crossfield* and *Mr. S. W. O'Brien* were on the brief, for plaintiff in error.

Mr. Edward S. Bailey for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

A case of eminent domain exercised by the railroad company to condemn twelve small parcels of land in Lucena, Province of Tayabas, Philippine Islands, in accordance with the petition of the railroad company.

In accordance with the statutory provisions three commissioners were appointed to hear the parties and inspect the properties. They subsequently reported that the parties had been heard and that they, the commissioners, had inspected the properties and examined the same "inch by inch."

They made further detail of their proceedings, set forth certain causes for the increase in value of the properties in the four or five years preceding the hearing, even before the coming of the railroad to the town "so that the value of land near Cotta was quoted at P2.00 up per square meter, according to the importance and situation of the land," but that the railroad had "undoubtedly greatly influenced the rise in the prices of the same lands." They reported, however, that, taking into consideration all the circumstances, benefits to the railroad and others, they unanimously fixed the values of the pieces of prop-

erty belonging to the parties who were first impleaded in the cause. These values it is not necessary to give nor to designate the properties to which they were attached, for the reason that the ownership of the properties, part before and part after the rendition of the commissioners' report, had become vested in the Tayabas Land Company.

In accordance with the report judgment was rendered in favor of the land company for P81,412.75, with interest at the rate of 6% from the date of taking possession of the land.

Motions for new trials were denied and the case was taken to the Supreme Court of the Islands by the railroad company, and that court modified the judgment by reducing the award for one of the parcels, containing 16,094 square meters, to the sum of P6,500, and the damages for the remaining parcels were fixed at the same proportionate amount.

The land company says, however, that "the prime question involved in this entire case is in its last analysis one of value, that is, what is a fair value of the land taken by the railroad company for its railroad station at Lucena?" That, indeed, is the ultimate inquiry, but it depends, according to other contentions, upon the power of the Supreme Court over the report of the commissioners and to review and consider the evidence. In other words, the weight that was to be given to the report of the commissioners as a matter of fact and law under § 246 of the Code of Civil Procedure of the Islands and to the findings of the Court of First Instance under §§ 273 and 497 of the same code.

Section 273 describes the elements that must be considered in determining in a case where "the preponderance or superior weight of evidence on the issues involved lies," and § 497 provides for the extent of the power of the Supreme Court to review and dispose of the case on ap-

peal, and it is contended that the Supreme Court was bound, as the Court of First Instance was, to decide by the preponderance of the evidence determined in the same way. This may be conceded, and to what extent the Supreme Court satisfied the requirement of the section we shall presently consider after we have given attention to the more insistent contention based on § 246, which reads as follows:

"Upon the filing of such report in court, the court shall, upon hearing, accept the same and render judgment in accordance therewith; or for cause shown, it may recommit the report to the commissioners for further report of facts; or it may set aside the report and appoint new commissioners; or it may accept the report in part and reject it in part, and may make such final order and judgment as shall secure to the plaintiff the property essential to the exercise of his rights under the law, and to the defendant just compensation for the land so taken; and the judgment shall require payment of the sum awarded as provided in the next section, before the plaintiff can enter upon the ground and appropriate it to the public use."

It will be observed that an alternative power is presented, either to accept the report and render judgment in accordance therewith or to make other dispositions of it or upon it; the latter, however, in a very general way. And the absence of detail encourages and gives some plausibility to controversy, but it is resolved, we think, against the contention of the land company by the analysis of the Supreme Court of the section. The court points out, quoting the section, that it may "accept the report in part and reject it in part;" and it observed that that situation alone might limit the court's power if it were not also empowered "to make such final order and judgment as shall secure to the plaintiff the property essential to the exercise of his rights under the law, and

to the defendant just compensation for the land so taken." A comprehensive power, we may instantly say, and one required to be exercised and adequate when exercised to pass upon and finally adjudge the designated rights. And it gives facility to the statute, substitutes for circumlocution and delay, directness and expedition, qualities that a statute of eminent domain should possess.

The court further pointed out that the "'final order and judgment' are reviewable by this court by means of a bill of exceptions in the same way as any other 'action,'" and decided besides that § 496 of the Code was applicable. That section gives power in the exercise of appellate jurisdiction to "affirm, reverse, or modify any final judgment, order, or decree of the Court of First Instance." And this discretion, the Supreme Court in the present case decided, extends to cases of eminent domain and, where § 497 of the Code providing for motions for new trial had been complied with, it, the court, might "examine the testimony and decide the case by a preponderance of the evidence; or, in other words, retry the case on the merits and render such order or judgment as justice and equity may require." The final conclusion of the court was, rejecting the contention of appellants, that it had power "to change or modify the report of the commissioners by increasing or decreasing the amount of the award" if the facts of the case justified. And it was the conclusion of the court that the facts so justified; and, after a review of prior cases, it rejected the contention that its conclusion was in conflict with them.

It will be observed, therefore, that the court considered that it was under the same obligation to determine the case by the preponderance of the evidence as was the Court of First Instance, and discharging its obligation, that is, in determining upon the weight of the evidence, its estimate of the values of the properties taken by the railroad was different from that of the Court of First Instance.

We are brought back, therefore, to the consideration of § 246 and the contention of plaintiff in error that under it the Supreme Court had transcended its powers in reducing the values found and reported by the commissioners and "erred in holding as a matter of law that appellants were not entitled to recover the amount fixed by the commissioners," they being the tribunal to hear the evidence and view the premises, and that under § 246, their report being filed, the court was required "upon hearing to accept the same and render judgment in accordance therewith," there being no cause shown, it is contended, for recommitting the report or exercising any of the other alternatives permitted by the section.

But, as we have seen, as to its power of action upon the report of the commissioners the court differed radically with the land company, and if we should, in deference to the land company's contention, admit there is ambiguity in § 246, we should be unable nevertheless to reverse the ruling of the Supreme Court of the Islands upon the local statutes, and we must assume the court gave consideration to all of the testimony and estimated the weight to be assigned to the report and to the declaration of the commissioners that they had examined "inch by inch" the properties involved. We say this only in passing. The case is here on writ of error and we cannot examine questions of fact. *Santos* v. *Roman Catholic Church*, 212 U. S. 463; *Ling Su Fan* v. *United States*, 218 U. S. 302, 308; *Harty* v. *Victoria*, 226 U. S. 12; *Gauzon* v. *Compañia General &c.*, 245 U. S. 86, 88.

Errors of law besides those stated above are asserted. For instance the company contends that the court used the evidence that had been introduced to prove title as evidence of value and, further, assigned too much strength to it. Both propositions are too intimately associated with and dependent upon the whole case to be estimated in separation. The court's consideration, therefore, or its

judgment upon them we cannot disturb. Indeed, the contention of the land company is but an instance of its broader contention of want of power in the Supreme Court to review the findings of the Court of First Instance or to disregard the report of the commissioners. Accepting the decision of the court upon those propositions, we necessarily affirm its judgment.

Judgment affirmed.

MR. JUSTICE BRANDEIS concurs in the result.

JOSEPH SCHLITZ BREWING COMPANY *v.* HOUSTON ICE & BREWING COMPANY ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 326. Submitted April 24, 1919.—Decided May 19, 1919.

A manufacturer of beer cannot claim the exclusive right to use brown bottles with brown labels; but their adoption by a competitor may contribute to a wrongful deception if combined with an imitative inscription.

Held, that defendant's label was so dissimilar to plaintiff's in shape, script, meaning, and mode of attachment, that it could not be said to add appreciably to any deception that might arise from the brown color of label and bottle.

241 Fed. Rep. 817, affirmed.

THE case is stated in the opinion.

Mr. Russell Jackson for petitioner. *Mr. John W. McMillan* was on the brief.

Mr. H. M. Garwood for respondents. *Mr. Jesse Andrews* and *Mr. Walter H. Walne* were on the brief.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought to restrain the use of a trade-mark alleged to infringe the plaintiff's or at least to be used in a way that is calculated to deceive and unfairly to interfere with the plaintiff's good will. Both Courts have found for the defendant, 241 Fed. Rep. 817, 154 C. C. A. 519, so that the only question that we shall consider is whether upon inspection it can be said as matter of law that the admitted acts of the defendant are a wrong of which the plaintiff can complain.

Both parties sell beer in brown bottles with brown labels and the plaintiff conceded below and still with some unwillingness seems to concede that, although perhaps it first introduced them in this connection and this place, it cannot claim the brown bottle, the brown label, or the two combined. These could be used without a warning, such as sometimes is required, that the beer was not the plaintiff's. The only question is how the additional element, the form of the inscription, should be treated. It often is said that the plaintiff must show a deception arising from some feature of its own not common to the public. *United States Tobacco Co.* v. *McGreenery*, 144 Fed. Rep. 531, 532, cited by the Court below. But so stated the proposition may be misleading. It is not necessary that the imitation of the plaintiff's feature taken alone should be sufficient to deceive. It is a fallacy to break the fagot stick by stick. It would be enough if taken with the elements common to the public the inscription accomplished a result that neither would alone. *New England Awl & Needle Co.* v. *Marlborough Awl & Needle Co.*, 168 Massachusetts, 154, 156.

But it is true that the unlawful imitation must be what achieves the deception, even though it could do so only on the special background lawfully used. The question again narrowed is whether that is the case here. The

shape of the defendant's label is different from the plaintiff's; the script upon it not only is wholly different from the other in meaning, to one who reads the two, but hardly can be said to resemble it as a picture. The two labels are attached to the bottles in quite unlike modes. The Schlitz is applied in a spiral around the length of the bottle so as to make the ends of the label parallel to the sides of the glass. The defendant's is pasted around the bottom of the bottle in the usual way. This diversity of itself renders mistake unlikely. If there were deception it seems to us that it would arise from beer and brown color and that it could not be said that the configuration appreciably helped. *Coats* v. *Merrick Thread Co.*, 149 U. S. 562, 573. Beyond stating the principles to be applied there is little to be said except to compare the impression made by the two, or, if that form of statement is preferred, the memory of Schlitz with the presence of the defendant's bottles as marked.

Decree affirmed.

MR. JUSTICE MCKENNA and MR. JUSTICE PITNEY dissent.

COLEMAN, SURVIVING ADMINISTRATRIX OF COLEMAN, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 343. Argued April 29, 1919.—Decided May 19, 1919.

A tax demanded and paid under § 29 of the War Revenue Act of June 13, 1898, c. 448, 30 Stat. 448, on a contingent beneficial interest not vested prior to July 1, 1902, contrary to the Refunding Act of June 27, 1902, c. 1160, § 3, 32 Stat. 406, is a tax "erroneously

collected" within the meaning of the Act of July 27, 1912, c. 256, 37 Stat. 240, although the payment was without protest or reservation, and under that act the right to a refund is barred if the claim was not presented to the Commissioner of Internal Revenue on or before January 1, 1914.
53 Ct. Clms. 628, affirmed.

THE case is stated in the opinion.

Mr. H. T. Newcomb for appellant.

The Solicitor General for the United States.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit to recover $6,721.71 paid for a tax upon the distributive shares of the children of Walter H. Coleman in his personal property. The tax was demanded and paid under the Act of June 13, 1898, c. 448, § 29, 30 Stat. 448, 464, 465. The later Act of June 27, 1902, c. 1160, § 3, 32 Stat. 406, directed the refunding of so much of such taxes "as may have been collected on contingent beneficial interests which shall not have been vested prior to July first," 1902, and forbade a tax to be imposed upon such an interest. On July 1, 1902, Coleman was dead but his debts had not been paid, the year allowed for the proof of claims against his estate had not expired, and the expenses of administration had not been ascertained. Therefore, it is said, the interest of his children still was contingent. *United States* v. *Jones*, 236 U. S. 106. *McCoach* v. *Pratt*, 236 U. S. 562. The tax was collected on May 29, 1903. On March 17, 1914, the claimants applied to the Collector of Internal Revenue and through him to the Commissioner of Internal Revenue to refund it. The application was rejected and on March 9, 1916, the claimant began this suit. The Court of Claims held that it was barred by the Act of July 27, 1912, c. 256, 37 Stat. 240.

That statute provides that "all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected" under the above mentioned § 29 of the Act of June 13, 1898, "or of any sums alleged to have been excessive, or in any manner wrongfully collected under the provisions of said Act may be presented to the Commissioner of Internal Revenue on or before the first day of January, nineteen hundred and fourteen, and not thereafter." By § 2 payment of claims so presented is directed. The act is entitled "An Act Extending the time for the repayment of certain war-revenue taxes erroneously collected," and the claimant contends that the present claim is not of that sort, that this tax having been paid without protest or any reservation of rights, the claim is only for a bounty conferred by the Act of 1902 and that the benevolence of that act never has been withdrawn. But, bounty or not, the direction in the Act of 1902 was on the footing that the sums ordered to be repaid were collected erroneously, *Vanderbilt* v. *Eidman*, 196 U. S. 480, and was an order for the refunding of a tax alleged to have been erroneously collected. The present tax had not been collected when the Act of June 27, 1902, was passed, but was collected afterwards contrary to its terms. There was little bounty in its application to such a case. No argument can make it plainer than do the words themselves that the Act of 1912 applies to the present claim, and that it was presented too late.

Judgment affirmed.

SAGE ET AL., EXECUTORS OF SAGE, v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 344. Argued April 29, 1919.—Decided May 19, 1919.

A suit against a collector of internal revenue to recover money wrongfully collected as taxes is personal, notwithstanding the statutory provisions for preliminary appeal to the Commissioner, appearance by the district attorney, and payment by the United States in certain cases; and, since the United States is not privy to the judgment, a recovery of part in a suit for the whole against the collector, and satisfaction of the judgment by the United States, do not bar a suit against the United States for the remainder in the Court of Claims. P. 36.

Claims already presented to the Commissioner under the Act of June 27, 1902, c. 1160, § 3, 32 Stat. 406, for taxes on contingent legacies erroneously collected under § 29 of the War Revenue Act of June 13, 1898, and satisfied in part only through a suit against the collector, need not be presented anew in order to obtain, as to the residue, the benefit of the Refunding Act of July 27, 1912, c. 256, 37 Stat. 240. P. 38.

The Act of 1912, *supra*, created new rights; its only condition is that the claims shall have been presented not later than January 1, 1914; and the limitation on suit in the Court of Claims (Rev. Stats., § 1069) does not begin before that date. P. 38.

So *held* where the claim had been presented under the Act of 1902, *supra*, rejected, and in part satisfied through suing the collector, and suit for the residue was begun in the Court of Claims January 23, 1917, application for repayment having been made September 7, 1916, and rejected October 30. *Id.*

53 Ct. Clms. 628, reversed.

THE case is stated in the opinion.

Mr. H. T. Newcomb for appellants.

The Solicitor General for the United States:

The ground of the present suit is that the taxes in question were erroneously collected on "contingent beneficial

interests" contrary to the Act of June 27, 1902. Since the latter act was in force at the time the former suit was brought it can only be presumed that the suit was based on the same ground. But whether it was or not is immaterial since the subject-matter of the suit was the same. *Northern Pacific Ry. Co.* v. *Slaght*, 205 U. S. 122, 130, 131; *Stark* v. *Starr*, 94 U. S. 477, 485.

From the decision in *Ward* v. *Sage*, 185 Fed. Rep. 7, it conclusively appears that the subject-matter of that suit was identical with the subject-matter of the present one.

While the United States was not *eo nomine* a party to the record, the former suit obviously was in effect a suit against the United States, under statutes authorizing it to be so brought, and the least that can possibly be said is that the United States was a privy to the suit. The requirements of the doctrine of *res judicata* therefore are amply met.

While there undoubtedly exists at common law a right of action against a tax collector to recover sums wrongfully collected and paid under protest, such a suit when brought against a collector of internal revenue is in substance a suit against the United States, the Government by the statutes having consented to be sued in the name of the collector. This conclusion follows from a consideration of the provisions of the statutes relating to such suits. *State Railroad Taxes*, 92 U. S. 575, 613; *Crocker* v. *Malley*, 249 U. S. 223; *Philadelphia* v. *The Collector*, 5 Wall. 720, 733; *Andreae* v. *Redfield*, 98 U. S. 225, 233.

The claim for $33,665.39, not having been presented to the Commissioner of Internal Revenue prior to January 1, 1914, is barred by the Act of July 27, 1912.

The claim filed in August, 1903, cannot be the basis of the present suit. That claim was merged into and extinguished by the judgment. The present suit is for the difference between the amount of the judgment recovered

on the former claim and the whole amount of the tax, viz., $33,665.39, and no claim for this amount has ever been presented to the Commissioner of Internal Revenue, although application for the payment thereof was made to the Secretary of the Treasury on September 7, 1916. The former claim was filed simply as an essential prerequisite to the bringing of a suit against the collector of internal revenue (see § 3226, Rev. Stats.), and was merged into and extinguished by the judgment recovered in that suit.

No claim presented by the appellants, or any of them, was pending on file when the Act of July 27, 1912, was passed. None has been filed since. The claim therefore could not be considered.

If it be contended that the purpose of the Act of 1912 was to give to holders of claims the right to have those filed or to be filed prior to January 1, 1914, paid by the Secretary of the Treasury, clearly there was no provision that a claim filed which had been rejected and on which suit had been brought and the judgment rendered thereon satisfied by the United States should be treated as a pending claim.

If the portion rejected as a valid claim in that suit could be again asserted by virtue of the Act of 1912, clearly a claim for that portion must be presented, not only because claimants insist it is different from the claim as an entirety and severable, but because the former claim filed was no longer pending but had been acted on and terminated as a claim.

If the present suit be regarded as based on the claim filed in August, 1903, then the suit is itself barred. Claims under § 3 of the Act of June 27, 1902, being payable on presentation, it follows that the claim [*i. e.*, cause of action] "first accrues" when the application for refund is made, within the meaning of § 1069, Rev. Stats., (Jud. Code, § 156). *United States* v. *Taylor*, 104 U. S. 216;

United States v. *Cooper*, 120 U. S. 124, 126; *Rice* v. *United States*, 122 U. S. 611, 620; *United States* v. *Wardwell*, 172 U. S. 48.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a claim under the Acts of June 27, 1902, c. 1160, § 3, 32 Stat. 406, and of July 27, 1912, c. 256, 37 Stat. 240, to have refunded a tax collected under the Act of June 13, 1898, c. 448, § 29, 30 Stat. 448, 464, 465, upon legacies to the wife and children of the testator Dean Sage. The petition was dismissed by the Court of Claims on demurrer. The testator died domiciled in New York on June 23, 1902, so that the debts of the estate were not ascertained and, as decided in *McCoach* v. *Pratt*, 236 U. S. 562, the legacies were not "absolutely vested in possession or enjoyment" before July 1, 1902, and therefore by the terms of the Act of 1902 were not subject to the tax under the above mentioned § 29. A tax of $63,940.88 was collected, however, in June, 1903. On August 24, 1903, an application to have it refunded on the ground that the legacies were not subject to taxation under § 29 was made to the Commissioner of Internal Revenue, but was denied in the following month. Two years later the petitioners sued the Collector and in May, 1912, got judgment for $30,275.49, with interest and costs, which was satisfied by the United States. *McCoach* v. *Pratt*, *supra*, and *United States* v. *Jones*, 236 U. S. 106, had not been decided at that time and it was held that some of the interests were vested in enjoyment. *Ward* v. *Sage*, 185 Fed. Rep. 7. This suit is for the unrepaid residue and was begun on January 23, 1917. The Government contends that the judgment and also the Act of July 27, 1912, c. 256, § 1, 37 Stat. 240, are bars to the present claim.

The former judgment is not a bar. It is true that the

statutes modify the common-law liability for money wrongfully collected by duress so far as to require a preliminary appeal to the Commissioner of Internal Revenue before bringing a suit. Rev. Stats., § 3226. It is true also that it is the duty of the District Attorney to appear for the collector in such suits, Rev. Stats., § 771; that the judgment is to be paid by the United States and the Collector is exempted from execution if a certificate is granted by the Court that there was probable cause for his act, Rev. Stats., § 989; and that there was a permanent appropriation for the refunding of taxes illegally collected. Rev. Stats., § 3689 (17). No doubt too, if it appeared in a suit against a collector who had acted with probable cause and had turned over his money to the United States, that a part of the tax properly was due to the United States, unnecessary formalities might be omitted and the sum properly due might be retained. Of course, the United States in such a case could not require a second payment of that sum. *Crocker* v. *Malley*, 249 U. S. 223. But no one could contend that technically a judgment of a District Court in a suit against a collector was a judgment against or in favor of the United States. It is hard to say that the United States is privy to such a judgment or that it would be bound by it if a suit were brought in the Court of Claims. The suit is personal and its incidents, such as the nature of the defenses open and the allowance of interest, are different. It does not concern property in which the United States asserts an interest on its own behalf or as trustee, as in *Minnesota* v. *Hitchcock*, 185 U. S. 373, 388. At the time the judgment is entered the United States is a stranger. Subsequently the discretionary action of officials may, or it may not, give the United States a practical interest in the amount of the judgment, as determining the amount of a claim against it, but the claim would arise from the subsequent official act, not from the judgment itself. *United States* v.

Frerichs, 124 U. S. 315. But perhaps it would be enough to say that if the judgment otherwise were a bar the bar would be removed by the subsequent enactment of the Act of July 27, 1912, c. 256, 37 Stat. 240, upon which, as well as the Act of 1902, this claim is based.

The Act of July 27, 1912, after providing in § 1 for the presentation of claims for taxes erroneously collected under the above mentioned § 29, as stated in the preceding case of *Coleman* v. *United States*, *ante*, 30, directs repayment in § 2 to "such claimants as have presented or shall hereafter so present their claims," and establish them. The claimants had presented their claim, and so had complied with the letter of the act. But it is said that they filed it simply as a prerequisite to their suit against the Collector and that its effect was extinguished by the judgment in that suit. This argument reads into the words of the statute what is not there and reads what was there out of the claim. The claim was presented to the Commissioner of Internal Revenue to get the money. The suit was only the undesired alternative in case the Commissioner rejected the claim. It plays no part in the question that we now are considering. Suppose that no suit had been brought we can see no ground for denying that the claim would have been presented within the meaning of the act. It did not have to be a claim under the act as the statute in terms contemplated that it might have been presented before the statute was passed. But if the presenting was sufficient before the suit was brought it is sufficient now. The statute of course does not confine its act of justice to unrejected claims.

The Act of 1912 applied in terms to "all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected" under the above mentioned § 29. The only condition was that it should have been presented not later than January 1, 1914. Until that time no statute of limitations could begin to run.

33. Syllabus.

After the act was passed an application was made on September 7, 1916, to the Secretary of the Treasury for repayment of the residue of the erroneously collected tax. It was rejected on October 30, 1916, on the mistaken ground that the judgment against the Collector finished the matter. This suit was brought on January 23, 1917, and so was within the six years allowed by Rev. Stats., § 1069, for suits in the Court of Claims. The Act of 1912, like that of 1902, created rights where they had not existed before, *United States* v. *Hvoslef*, 237 U. S. 1, 12, 13, and the claimant's rights are not barred. See further *James* v. *Hicks*, 110 U. S. 272.

Judgment reversed.

STATE OF ARKANSAS *v.* STATE OF MISSISSIPPI.

IN EQUITY.

No. 7, Original. Argued March 3, 4, 1919.—Decided March 19, 1919.

Under Equity Rule 31, a replication *held* not required in order to put in issue the allegations of the answer. P. 41.

The act admitting Mississippi as a State describes the boundary as beginning "on the river Mississippi" and, after other courses, extending again "to the Mississippi river, thence up the same to the beginning"; the act admitting Arkansas describes the boundary as "beginning in the middle of the main channel of the Mississippi," thence along other courses, and back "to the middle of the main channel of the Mississippi river; thence up the middle of the main channel of the said river to the . . . point of beginning." *Held*, that the boundary between the two States as fixed by the acts was the middle of the main channel of navigation, and not a line equidistant from the banks of the river. P. 43. *Arkansas* v. *Tennessee*, 246 U. S. 158.

It does not appear that any specific agreement was entered into between the States of Mississippi and Arkansas, under the Joint Resolution of Congress of January 26, 1909, 35 Stat. 1161, author-

izing an agreement or compact "to fix the boundary line between said States, where the Mississippi River now, or formerly, formed the said boundary line," and to make mutual cessions of lands separated by changes in the river, settle jurisdiction as to offenses on the river, etc. P. 43.

The court finds no occasion in the constitutions, laws or decisions of the two States, or in acquiescence, and practices of the inhabitants of the disputed territory in recognition of another boundary, to depart from the principle which makes equality of navigation the controlling consideration in fixing the boundary between States separated by a navigable stream. P. 44.

In case of an avulsion, the boundary line is to be fixed at the middle of the main channel of navigation as it was just previous to the avulsion. P. 45.

The location of the disputed line will be left in the first instance to commissioners to be appointed by the court upon suggestions of counsel, with power to take further proofs as may be authorized by the interlocutory decree to be entered herein. P. 47.

THE case is stated in the opinion.

Mr. Herbert Pope, with whom *Mr. John D. Arbuckle*, Attorney General of the State of Arkansas, *Mr. John M. Moore* and *Mr. Albert M. Kales* were on the brief, for plaintiff.

Mr. Garner W. Green, with whom *Mr. Ross A. Collins*, Attorney General of the State of Mississippi, *Mr. Gerald Fitzgerald*, *Mr. George F. Maynard* and *Mr. Marcellus Green* were on the brief, for defendant.

MR. JUSTICE DAY delivered the opinion of the court.

This is a suit brought to determine a portion of the boundary line between the States of Arkansas and Mississippi. It appears that at the place in dispute the Mississippi River formerly had its course from Friar's Point in a southwesterly direction, then made a turn to the south, flowing in a southerly direction, then a turn towards the

west in the shape of a half moon, then a sharp turn to the north and flowing northerly, and thence westerly, making a bend in the river in the shape of a horseshoe, which was known as Horseshoe Bend. It is averred in the bill, that in 1848 the river suddenly left its course and ran westerly across the points of the bend, cutting off a tract of land which has become known as Horseshoe Island. The answer avers that this avulsion occurred in 1842; but the exact date is immaterial. That it did occur is clearly established, and it is generally spoken of in the testimony as happening in 1848. We may say preliminarily that we find no substance in the contention of the respondent that the allegations of the answer must be taken as true for want of replication. Under new Equity Rule 31 in a case of this character no replication is required in order to make the issues.

The State of Arkansas contends that the old course of the river before the avulsion was within a body of water now known as Horseshoe Lake or Old River, a body of water of considerable length and depth. The State of Mississippi contends that the old river ran through a body of water still remaining, but considerably further to the north, and known as Dustin Pond, and that before the avulsion the course of the river on the upper side of the Bend was considerably to the westward of the course claimed by Arkansas, and ran where now there is a slough not far from the middle of Horseshoe Island. These diverse claims are illustrated by an examination of the map, exhibit A, attached to the bill.

As we view the case it is practically controlled by the decision of this court in *Arkansas* v. *Tennessee*, 246 U. S. 158. In view of that decision we are relieved of the necessity of a discussion in detail of much that is urged upon our attention now. Arkansas was admitted to the Union June 23, 1836 (5 Stat. 50, 51) by an act of Congress which as to its boundaries provided:

"Beginning in the middle of the main channel of the Mississippi river, on the parallel of thirty-six degrees north latitude, running from thence west, with the said parallel of latitude, to the Saint Francis river, thence up the middle of the main channel of said river to the parallel of thirty-six degrees thirty minutes north; from thence west to the southwest corner of the State of Missouri; and from thence to be bounded on the west, to the north bank of Red river, by the lines described in the first article of the treaty between the United States and the Cherokee nation of Indians west of the Mississippi, made and concluded at the city of Washington, on the 26th day of May, in the year of our Lord one thousand eight hundred and twenty-eight; and to be bounded on the south side of Red river by the Mexican boundary line, to the northwest corner of the State of Louisiana; thence east with the Louisiana State line, to the middle of the main channel of the Mississippi river; thence up the middle of the main channel of the said river to the thirty-sixth degree of north latitude, the point of beginning."

Mississippi had previously been admitted to the Union by an act of Congress April 3, 1818, (3 Stat. 348), which provided:

"Beginning on the river Mississippi at the point where the southern boundary line of the state of Tennessee strikes the same, thence east along the said boundary line to the Tennessee river, thence up the same to the mouth of Bear Creek, thence by a direct line to the northwest corner of the county of Washington [Alabama], thence due south to the Gulf of Mexico, thence westwardly, including all the islands within six leagues of the shore, to the most eastern junction of Pearl river with Lake Borgne, thence up said river to the thirty-first degree of north latitude, thence west along the said degree of latitude to the Mississippi river, thence up the same to the beginning."

It will be observed that the language of the Mississippi act, so far as now important to consider, fixes the boundary upon the Mississippi River as "up the same to the beginning," and the language of the Arkansas act is: "beginning in the middle of the main channel of the Mississippi river . . . thence east, with the Louisiana State line, to the middle of the main channel of the Mississippi river, thence up the middle of the main channel of the said river to the thirty-sixth degree of north latitude, the point of beginning."

The State of Arkansas contends that these acts of Congress fix the middle of the channel of navigation as it existed before the avulsion as the boundary line between the States. By the State of Mississippi it is contended that the boundary line is a line equidistant from the well defined banks of the river. Language to the same effect as that contained in the acts of admission now before us was before this court in the case of *Arkansas* v. *Tennessee*, *supra*, and in that case the subject was considered, and the meaning of the Arkansas act, and similar language in the act admitting the State of Tennessee, was interpreted. The rule laid down in *Iowa* v. *Illinois*, 147 U. S. 1, was followed, and it was held that where the States of the Union are separated by boundary lines described as "a line drawn along the middle of the river," or as "the middle of the main channel of the river," the boundary must be fixed at the middle of the main navigable channel, and not along the line equidistant between the banks. We regard that decision as settling the law, and see no reason to depart from it in this instance.

It is urgently insisted that the laws and decisions of Arkansas and Mississippi are to the contrary, and our attention is called to Joint Resolution of Congress of 1909, 35 Stat. 1161, which provides:

"That the consent of the Congress of the United States is hereby given to the States of Mississippi and Arkansas

to enter into such agreement or compact as they may deem desirable or necessary, not in conflict with the Constitution of the United States, or any law thereof, to fix the boundary line between said States, where the Mississippi River now, or formerly, formed the said boundary line and to cede respectively each to the other such tracts or parcels of the territory of each State as may have become separated from the main body thereof by changes in the course or channel of the Mississippi River and also to adjudge and settle the jurisdiction to be exercised by said States, respectively, over offences arising out of the violation of the laws of said States upon the waters of the Mississippi River." Approved January 26, 1909.

No specific agreement appears to have been entered into under this act; but it is insisted that Arkansas and Mississippi by their respective constitutions have fixed the boundary line, as it is now claimed to be by the State of Mississippi, and that such boundary line has become the true boundary of the States irrespective of the decision of this court in *Iowa* v. *Illinois*, *supra*, followed in *Arkansas* v. *Tennessee*, *supra*. We have examined the constitutions and decisions of the respective States, and find nothing in them to change the conclusions reached by this court in determining the question of boundary between States. A similar contention was made in *Arkansas* v. *Tennessee* as to the effect of the Arkansas and Tennessee legislation and decisions, and the contention that the local law and decisions controlled in a case where the interstate boundary was required to be fixed, under circumstances very similar to those here presented, was rejected. In that case the Arkansas cases, which are now insisted upon as authority for the respondent's contention, were fully reviewed. The Mississippi cases called to our attention, of which the leading one seems to be *The Steamboat Magnolia* v. *Marshall*, 39 Mississippi, 109, as well as the legislation of the

State, seem to sustain the claim that local jurisdiction and right of soil to the middle of the river, is fixed by a line equidistant from the banks. But whatever may be the effect of these decisions upon local rights of property or the administration of the criminal laws of the State, when the question becomes one of fixing the boundary between States separated by a navigable stream, it was specifically held in *Iowa* v. *Illinois, supra,* followed in later cases, that the controlling consideration is that which preserves to each State equality in the navigation of the river, and that in such instances the boundary line is the middle of the main navigable channel of the river. In *Arkansas* v. *Tennessee, supra,* p. 171, we said: "The rule thus adopted, [that declared in *Iowa* v. *Illinois*] known as the rule of the 'thalweg,' has been treated as set at rest by that decision. *Louisiana* v. *Mississippi,* 202 U. S. 1, 49; *Washington* v. *Oregon,* 211 U. S. 127, 134; 214 U. S. 205, 215. The argument submitted in behalf of the defendant State in the case at bar, including a reference to the notable recent decision of its Supreme Court in *State* v. *Muncie Pulp Co.* (1907), 119 Tennessee, 47, has failed to convince us that this rule ought now, after the lapse of twenty-five years, to be departed from."

We are unable to find occasion to depart from this rule because of long acquiescence in enactments and decisions, and the practices of the inhabitants of the disputed territory in recognition of a boundary, which have been given weight in a number of our cases where the true boundary line was difficult to ascertain. (See *Arkansas* v. *Tennessee, supra,* and the cases cited at p. 172.)

This record presents a clear case of a change in the course of the river by avulsion, and the applicable rule established in this court, and repeatedly enforced, requires the boundary line to be fixed at the middle of the channel of navigation as it existed just previous to the avulsion. The location and determination of such bound-

ary is a matter which we shall leave in the first instance to a commission of three competent persons to be named by the court upon suggestion of counsel, as was done in *Arkansas* v. *Tennessee*. See 247 U. S. 461. This commission will have before it the record in this case, and such further proofs as it may be authorized to receive by an interlocutory decree to be entered in the case. Counsel may prepare and submit the form of such decree.

BALL ENGINEERING COMPANY *v.* J. G. WHITE & COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 227. Argued March 13, 1919.—Decided May 19, 1919.

A provision in a construction contract that in case of annulment "the United States all have the right to take possession of, wherever they may be, and to retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of same prepared for use or in use in the prosecution of the work, . . . under purchase, at a valuation to be determined by the Engineer Officer in charge," *held* not applicable, *in invitum*, to property belonging to, and which had been used in the construction by, a third party. P. 54.

Upon annulment of a construction contract, the Government retained certain property, on the site, which belonged to a third party who had been doing the work, and, with knowledge of his claim and without his consent, valued it, credited the defaulting contractor accordingly, and leased or disposed of it to a new contractor, at the latter's request, for the completion of the work, upon the understanding that the United States did not undertake to transfer title, nor guarantee peaceable possession, etc., and would not be responsible for the expense or cost of any action against the new contractor nor subject itself to any claim on account of the seizure. *Held*, that no contractual liability could be implied against the United

States, and that the new contractor, having so taken and used the property, was liable to its owner for the conversion. *Id. United States* v. *Buffalo Pitts Co.*, 234 U. S. 228, distinguished 241 Fed. Rep. 989, reversed.

THE case is stated in the opinion.

Mr. William M. Parke and *Mr. Charles D. Lockwood*, with whom *Mr. Homer S. Cummings* and *Mr. S. L. Swarts* were on the brief, for petitioner:

The taking of the plaintiff's property by the officers of the United States was not a taking under eminent domain, but a proprietary taking under a doctrine of private law which did not in any way rest upon the rights of the Government as sovereign and which, if correct in theory, would have been equally available to any private citizen under similar circumstances.

Since the taking was tortious, the plaintiff cannot recover the value from the Government. No title can be acquired by a tortious taking.

Neither the plaintiff nor its predecessors in title ever entered into any contractual relation which had the effect of bringing their property within the operation of the Government's contract with the Hubbard Building & Realty Company, and therefore, no matter what construction be placed upon paragraph 33 of that contract it could not affect the plaintiff's title to the property.

A right to "purchase" plaintiff's property could not be exercised by seizing it and making payment to the Hubbard Building & Realty Company.

The Government, in purporting to exercise its alleged rights under paragraph 33, attempted to retain the plant under lease. Since paragraph 33 did not permit the Government to retain property under lease but only to retain it under purchase, such an effort to lease was wholly nugatory and did not vest any title, interest or right to possession in the Government.

Mr. Harry W. Reynolds and *Mr. J. Kemp Bartlett*, with whom *Mr. Lewis Sperry* was on the brief, for respondent:

The taking of the property by the officers of the United States was a valid exercise of the power of eminent domain. Act March 3, 1905, 33 Stat. 1131; Act of April 24, 1888, 25 Stat. 94; *United States* v. *Certain Lands in Narragansett*, 145 Fed. Rep. 654, 657; *Houck* v. *United States*, 201 Fed. Rep. 867; *United States* v. *Buffalo Pitts Co.*, 234 U. S. 228; *United States* v. *Société Anonyme &c.*, 224 U. S. 309; *United States* v. *Lynah*, 188 U. S. 445; *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645; *s. c.* 124 U. S. 581.

In all these cases, as well as in the case at bar, the Government took property or rights that were needed by it in the making of public improvements or in furtherance of public welfare, but to which it asserted no title vested in the Government prior to the taking. The government engineers made no claim that the property in question had become the Government's property. They asserted that under the terms of the contract the Government had the right to retain and use it in the completion of the work and also to purchase it at a price to be determined by the engineer officer in charge, but the purchase was a mere incident, the important fact being the retention for use in completing the work, of the property involved.

The United States had the right under the specifications to hold and use the property in the completion of the work, and therefore the use by the respondent was not tortious and does not render the respondent liable to the petitioner for a conversion.

The petitioner can succeed solely upon the strength of its own title and its right, if it had any, to the possession of the property in June or July, 1910. That the petitioner was not in either actual or constructive possession of the property at that time or for a long time prior thereto is clearly established. Section 33 of the specifications

is carefully worded so as to include all the buildings, materials, machinery, etc., or any part or parts of same "prepared for use or in use in the prosecution of the work," whether the property of the contractor or otherwise. The only limitation is to be found in the words "prepared for use or in use in the prosecution of the work." The buildings, plant and materials assembled upon the work and used by Mr. Ball and his firm were "prepared for use" and were "used in the prosecution of the work."

If the important right reserved to the Government by the contract and which, as section 33 shows, is reserved in "the form of contract in use by the Engineer Department of the Army," can be lost by an arrangement between the nominal contractor and the contractor who actually does the work, by which the one doing the work is allowed to do it in the name and in the place and stead of the nominal contractor, the consequence will be serious, not alone to the Government, but also to all contractors who are in competition for public work with any who may contemplate the creation of a situation that will enable them to play fast and loose with the Government; that is to continue with the work only so long as it is profitable, and withdraw from it with their buildings, plant and materials when it ceases to be advantageous to them to continue. Mr. Ball had actual, or certainly constructive, notice of the provisions of the section at the time when the property was brought to the site. Among other cases involving similar clauses in construction contracts, see: *Tinker & Scott* v. *U. S. Fidelity & Guaranty Co.*, 169 Fed. Rep. 211; *Duplan Silk Co.* v. *Spencer*, 115 Fed. Rep. 689; *Hart* v. *Porthgain Harbour Co.* [1903], 1 L. R. Ch. Div. 690, 696.

The provisions contained in section 33 of the specifications were inserted in the interest of the United States as a security and guarantee that the work would be performed to its completion, and as a protection against loss in the

event of abandonment of the work by the contractor or anyone standing in the contractor's shoes.

It would be imposing a great hardship upon the respondent, to compel it to pay a second time for the material, and an exorbitant sum, in addition to the rental already paid by it to the Government, for the buildings and plant that the Government authorized it to use.

The Solicitor General, by leave of court, filed a brief on behalf of the United States as *amicus curiæ:*

Where the case is not founded on the Constitution of the United States or a law thereof, or a regulation of an executive department, no recovery can be had if the case be one sounding in tort. *United States* v. *Buffalo Pitts Co.*, 193 Fed. Rep. 905, 908, 909; 234 U. S. 228, 232; *Dooley* v. *United States*, 182 U. S. 222; *United States* v. *Lynah*, 188 U. S. 445, 474; *White & Co.* v. *Ball Engineering Co.*, 223 Fed. Rep. 618, 620; *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U. S. 28, 32; *Russell* v. *United States*, 182 U. S. 516, 530, 535; *Peabody* v. *United States*, 231 U. S. 530, 539; *Harley* v. *United States*, 198 U. S. 229, 234; *Juragua Iron Co.* v. *United States*, 212 U. S. 297, 309; *Crozier* v. *Krupp*, 224 U. S. 290, 303, 304; *New Orleans-Belize S. S. Co.* v. *United States*, 239 U. S. 202, 206, 207; *Tempel* v. *United States*, 248 U. S. 121.

The claim of the Ball Engineering Company against the United States, if any, does not arise under the Constitution, and, therefore, necessarily is a case sounding in tort. *Peabody* v. *United States*, 231 U. S. 538, 539.

MR. JUSTICE DAY delivered the opinion of the court.

The Ball Engineering Company, a Missouri corporation, brought this action against J. G. White & Company, Inc., a Connecticut corporation, in the United States District Court for the District of Connecticut, for damages for

the alleged conversion of a contractor's plant and equipment, which was prepared for use in prosecuting the work of constructing lock and dam No. 6, on the Trinity River, in the State of Texas, and all of which, including buildings, were located upon the site of the lock and dam at the time of the alleged conversion. The action was tried before a referee, designated under the Connecticut practice a Committee. Two trials were had, the first resulting in a judgment in favor of the plaintiff for the value of the converted property. 212 Fed. Rep. 1009. That judgment was reversed by the Circuit Court of Appeals (223 Fed. Rep. 618), and a new trial ordered which took place before the same Committee, and upon the same evidence and the same findings of fact, in order to conform to the decision of the Circuit Court of Appeals, judgment was rendered in favor of the defendant, and this was affirmed by the Circuit Court of Appeals on the authority of its prior decision. 241 Fed. Rep. 989. The case is here upon writ of certiorari.

The United States filed its brief *amicus curiæ*, contending that the decision of the Circuit Court of Appeals to the effect that the United States is liable under the Tucker Act when property of a third person is taken by one of its agents, under the circumstances disclosed, was erroneous.

The material facts are:

On July 10, 1906, the United States entered into a contract with the Hubbard Building & Realty Company to construct lock and dam No. 6 on the Trinity River, Texas.

A partnership composed of George A. Carden and P. D. C. Ball, known as the Ball Carden Company, in the year 1908 placed a considerable amount of property, consisting of materials, machinery and tools, on the site of the lock and dam No. 6, and used them in constructing the lock and dam until the month of May, 1909.

This partnership was dissolved in April or May, 1909,

and discontinued the work theretofore carried on by it in the construction of the lock and dam. Carden transferred all his interest to Ball, who, under the name of the Ball Engineering Company, continued the work until on or about September 8, 1909.

It does not appear under what circumstances the Ball Carden Company or Ball operating as the Ball Engineering Company undertook the performance of the work.

On September 9, 1909, work upon said lock and dam was abandoned; on October 22, 1909, the Government annulled the contract with the Hubbard Company, pursuant to its provisions.

On April 2, 1910, the Ball Engineering Company was organized under the laws of Missouri, and P. D. C. Ball transferred to it all of the property mentioned in the complaint.

The United States entered into a contract with the defendant J. G. White & Company on June 6, 1910, to complete the construction of the lock and dam. Prior to the making of the contract the defendant attempted, without success, to agree with the Ball Company for the purchase or rental of the personal property, etc., specified in the complaint. On June 22, 1910, the Government notified the defendant that the Hubbard Company had been directed to move all property at lock and dam No. 6, except certain specified items, and determined the valuation of the same at $11,578, and fixed a monthly rental of $380 therefor from the Government to the defendant, and also fixed a valuation upon the material, etc., at the lock-site and notified the defendant to take such of it as it deemed proper, at such valuations respectively. The Ball Company refused to assent to either valuation. On July 18, 1910, the defendant receipted to the United States for the articles constituting the construction plant, and for such of the materials as it was willing to and did receive. The property which the Government took from the

Ball Engineering Company was valued by it at $11,578, which amount was credited on account of the Hubbard Company; but the United States neither paid, nor credited the purchase price or rental of the property to the Ball Company.

The United States professed to act under section 33 of the contract with the Hubbard Company, which reads:

"Annulment.—In case of the annulment of this contract as conditionally provided for in the form of contract adopted and in use by the Engineer Department of the Army, the United States shall have the right to take possession of, wherever they may be, and to retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of same prepared for use or in use in the prosecution of the work, together with any or all leases, rights of way or quarry privileges, under purchase, at a valuation to be determined by the Engineer Officer in charge."

The Government would not allow the Ball Company to take possession of any of the property used in the construction of the lock and dam. This property the United States leased to the defendant, who used the same in completing the work, and thereafter returned all of it to the Government, except, of course, such material as had been used in construction.

The Government inserted the following stipulation in its contract with the J. G. White & Company, Inc., "If so requested in writing by the contractor, the United States will exercise the right conferred by paragraph 33 of the specifications forming part of the annulled contract with the Hubbard Building & Realty Company, to take possession of and retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of the same prepared for use or in use in the prosecution of the work at a valuation to be determined by the Engineer Officer in charge, and the contractor for the completion of the work will be permitted to use such plant and material in the

prosecution of the work, for which he will be charged a fair rental or purchase value, to be determined by the Engineer Officer in charge. It must, however, be clearly understood that since the ownership of the above-mentioned plant and materials is not free from doubt, the United States does not undertake to transfer title, does not guarantee peaceable possession and uninterrupted use, and will not defend any action or writ that may be instituted against the contractor concerning the same nor be responsible for nor assume any expenses or costs in connection therewith. Nothing that may result from the exercise of the above-mentioned right shall be made the basis of a claim against the United States or its officers or agents."

The Circuit Court of Appeals, under the circumstances here disclosed, rightly held that the Government had no authority to take the property of the Ball Engineering Company by virtue of anything contained in its contract with the Hubbard Company. And further held that inasmuch as the Government took the property with the knowledge that it was claimed by the Ball Company and used it in the construction of public work, it was obliged to make just compensation to the Ball Company by reason of the Fifth Amendment of the Constitution. "It," says the Court of Appeals, "made no proprietary claim, and therefore was bound to pay the real owner for the property, whether the taking was tortious or not. It fully recognized this obligation by crediting the Hubbard Company with the value. The fact that it recognized the wrong person as owner and erroneously relied upon the contract with the Hubbard Company, by which the plaintiff was not bound, in no respect changed the material fact that it had taken the property and acquired title thereto."

The findings show that the Government took possession by virtue of its contract with the Hubbard Company; that it definitely advised White & Company that it would

not be responsible for the seizure of the property, and that anything which might result therefrom could not be the basis for any claim against the United States, its officers or agents. Under the circumstances disclosed the Circuit Court of Appeals held the White Company not liable to the Ball Engineering Company—upon the theory that the Government had appropriated the property under circumstances giving rise to an implied contract to pay the Ball Engineering Company for it. This ruling was made upon the authority of *United States* v. *Buffalo Pitts Company*, 193 Fed. Rep. 905, affirmed 234 U. S. 228. In that case a suit was brought under the Tucker Act by the Buffalo Pitts Company against the United States to recover for the value of the use of a certain engine for which, it was alleged, the United States was under an implied contract to pay. The findings of fact showed that the Buffalo Pitts Company sold a traction engine to the Taylor-Moore Construction Company, and took a chattel mortgage to secure the payment of the purchase money. The mortgage was duly recorded, and no part of the purchase money was paid. The engine was put into service by the Taylor-Moore Company upon a reclamation project undertaken by the Interior Department, the work being prosecuted under a contract between the United States and the Taylor-Moore Construction Company. The Construction Company defaulted in its work, and assigned all of its interest in the contract to the United States, and it took possession of all material, supplies and equipment belonging to the Construction Company, including the engine in question. The Buffalo Pitts Company made demand upon the District Engineer of the Reclamation Service for the possession of the engine and appurtenances. But the demand was refused, and the engine retained for use in the Government work. The Buffalo Pitts Company notified the representative of the United States of the execution and filing of its mortgage,

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and claimed the property. It was expressly found that the Government had at all times known of the existence of the mortgage, and did not dispute the validity thereof, but represented to the Buffalo Pitts Company that it was using and would continue to use the engine in its work, that any legal proceedings to recover possession would be resisted, and that if the property were left in the Government's possession its attorney would recommend payment therefor. It was further found that the Buffalo Pitts Company relied upon these facts, and consented to the Government retaining possession of its property—in the expectation of receiving compensation from it therefor. The claim was made that the United States was not liable for tortious acts. This court reviewed former cases, and said: "In the present case, as we have said, there is nothing to show that the Government expected to use the engine and appurtenances without compensation. It did not dispute the mortgage, and the findings of fact clearly show that if the Government had the right to take the property, notwithstanding the mortgage interest which the plaintiff had in it, it made no claim of right to take and use it without compensation as against the prior outstanding mortgage, which distinctly reserved the right to take and sell the property under the circumstances shown and which after the breach of condition vested the right of possession and the right to convert the property in the mortgagee."

It was further pointed out that the Government had authority under an act of Congress to acquire any property necessary for the purpose stated, and, if need be, to appropriate it. We held that the facts found brought the case within the principles decided in former cases and made the United States liable, not for a tortious act, but upon implied contract.

The subject was again reviewed by this court in a case decided at this term, *Tempel* v. *United States*, 248 U. S.

121, in which a suit was brought to recover the value of submerged lands in the Chicago River appropriated by the Government without the owner's consent. Former decisions of this court were reviewed, and we said: "If the plaintiff can recover, it must be upon an implied contract. For, under the Tucker Act, the consent of the United States to be sued is (so far as here material) limited to claims founded 'upon any contract, express or implied'; and a remedy for claims sounding in tort is expressly denied. *Bigby* v. *United States*, 188 U. S. 400; *Hijo* v. *United States*, 194 U. S. 315, 323. As stated in *United States* v. *Lynah*, 188 U. S. 445, 462, 465: 'The law will imply a promise to make the required compensation, where property to which the government asserts no title, is taken, pursuant to an act of Congress, as private property to be applied for public uses'; or in other words: 'Whenever in the exercise of its governmental rights it takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor.' But in the case at bar, both the pleadings and the facts found preclude the implication of a promise to pay. For the property applied to the public use is not and was not conceded to be in the plaintiff."

In the case under consideration the United States did not concede title in the Ball Engineering Company, but took the property knowing of the claim of that Company to its ownership, and credited its value upon the government contract with the Hubbard Company. The Government took this action upon request of the White Company, and advised that it would not under any circumstances be held liable for the seizure of the property. Under these circumstances, the implication of a contract that the United States would pay, which must be the basis of its liability under the Fifth Amendment, is clearly rebutted. The liability of the Government, if any, is in tort, for which it has not consented to be sued. As the findings show that

the White Company, with knowledge of the facts, procured and used the property of the Ball Company it ought to have been held liable to that Company. It follows that the judgment of the Circuit Court of Appeals must be

Reversed.

KENNY *v.* MILES ET AL.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 179. Argued January 24, 1919.—Decided May 19, 1919.

Subject to the provisions as to certificates of competency, lands allotted as homestead and surplus respectively, under the Act of June 28, 1906, c. 3572, 34 Stat. 539, in the right of a deceased Indian member of the Osage tribe, duly enrolled, and descending to Indian heirs, likewise members duly enrolled, are subject to the same restrictions on alienation as are imposed upon lands allotted to living members. P. 63. *Levindale Lead Co.* v. *Coleman*, 241 U. S. 432; *Mullen* v. *United States*, 224 U. S. 448; and *Skelton* v. *Dill*, 235 U. S. 206, distinguished.

Section 6 of the Act of April 18, 1912, c. 83, 37 Stat. 86, provides that "the lands of deceased Osage allottees, unless the heirs agree to partition the same, may be partitioned or sold upon proper order of any court of competent jurisdiction in accordance with the laws of the State of Oklahoma: *Provided*, That no partition or sale of the restricted lands of a deceased Osage allottee shall be valid until approved by the Secretary of the Interior." *Held:* (1) That the term "restricted lands" refers to the restrictions on alienation imposed by Congress to protect the Indians from their own incompetency, (p. 61); and (2) that, in the absence of approval by the Secretary, a judgment for partition or sale, in a suit brought under this section in the state court respecting such lands, is inoperative, so that a finding of heirship, forming a part of it, is not conclusive in other proceedings. P. 65.

162 Pac. Rep. 775, reversed.

58. Opinion of the Court.

THE case is stated in the opinion.

The Solicitor General, with whom *Mr. Assistant Attorney General Kearful* was on the brief, for petitioner.

Mr. H. P. White for respondents.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

In concluding a proceeding in the county court of Osage County, Oklahoma, for the settlement of the estate of Lah-tah-sah, a deceased Indian woman, it became necessary to determine who were her heirs. Two claimants appeared and sought to establish such a relation. One, John Kenny, claimed to be a son and the sole heir; and the other, Laban Miles, claimed to be the surviving husband and an equal heir with Kenny. It was conceded that Kenny was a son, but it was disputed that Miles ever was the deceased's husband. If he was such when she died, he and Kenny were equal heirs; otherwise Kenny was the sole heir.

At the hearing in that proceeding Miles produced and relied on a judgment in a partition suit, which he had brought against Kenny in the district court of the same county, wherein it was found that he and the deceased were married about a year before her death and that he remained her husband until she died. Over Kenny's protest, based on congressional enactments presently to be noticed, the county court treated that judgment as a conclusive determination of the matters so found and rejected evidence produced by Kenny to show that there had been no such marriage. It was accordingly adjudged that Miles and Kenny were equal heirs, and that decision was affirmed by the Supreme Court of the State. 162 Pac. Rep. 775. The case is here on writ of certiorari.

Whether, consistently with the congressional enactments on which Kenny's protest was based, the judgment in the partition suit could be treated as conclusive of the matters therein found is the ultimate federal question in the case.

Lah-tah-sah was an Indian of the Osage tribe, duly enrolled as such. This entitled her to share in the division and allotment of the lands and funds of the tribe under the Act of June 28, 1906, c. 3572, 34 Stat. 539. She died intestate August 19, 1908. Thereafter two tribal deeds naming her as grantee,[1] and approved by the Secretary of the Interior, were issued under that act. The deeds were for lands allotted to her or in her right out of the tribal lands. One was for 160 acres designated as a homestead, and the other was for 500.12 acres designated as surplus lands. Both purported to pass a title in fee simple, subject to the conditions, limitations and provisions of the act. It was to these lands that the judgment in the partition suit related. That judgment treated the lands as inherited from Lah-tah-sah and ordered that they be partitioned equally between Miles and Kenny as her heirs, or, if not susceptible of partition in kind, that they be sold with a view to an equal division of the proceeds.

By § 6 of the Act of April 18, 1912, c. 83, 37 Stat. 86, which is supplementary to and amendatory of the Act of 1906, it is provided that "the lands of deceased Osage allottees, unless the heirs agree to partition the same, may be partitioned or sold upon proper order of any court of competent jurisdiction in accordance with the laws of the State of Oklahoma: *Provided*, That no partition or sale of the restricted lands of a deceased Osage allottee shall be valid until approved by the Secretary of the Interior." It was after this enactment that the partition suit was

[1] As to the legal effect of the deeds issued to her after her death, see besides § 6 of the Act of 1906, Rev. Stats. § 2448; *Crews* v. *Burcham*, 1 Black, 352, 356; *United States* v. *Chase*, 245 U. S. 89, 101.

begun, and there was here no approval by the Secretary of the Interior.

Kenny's protest was based on the Acts of 1906 and 1912 and was to the effect that the lands to which the partition suit related were restricted lands and that in consequence the judgment for their partition or sale was of no effect in the absence of the prescribed approval by the Secretary of the Interior.

The term "restricted lands" in § 6 of the Act of 1912 means lands the alienation of which is subject to restrictions imposed by Congress to protect the Indians from their own incompetency. This is shown by a later sentence in the same section and by various provisions in the Act of 1906.

To determine whether the lands ordered to be partitioned or sold were restricted requires some consideration of the Act of 1906, for it was under that act that they were allotted and the tribal deeds issued. By its first section the act makes the tribal roll as existing January 1, 1906, with eliminations and additions not material here, the authentic roll of the members for the purposes of the act. By its second section it provides that the tribal lands, with stated exceptions, shall be divided among the members in such way as to give each a fair share in acres; that every member "shown by the roll" shall be permitted to select three tracts of 160 acres each; that after all have made the three selections the remaining lands, with some exceptions, shall be divided as equally as practicable by a designated commission, and that—

"Fourth. . . . Each member of said tribe shall be permitted to designate which of his three selections shall be a homestead,[1] and his certificate of allotment and deed shall designate the same as a homestead, and the same

[1] A subsequent joint resolution permitted the homestead to be designated from lands in any one or more of the three selections. February 27, 1909, 35 Stat. 1167.

shall be inalienable and nontaxable until otherwise provided by Act of Congress. The other two selections of each member, together with his share of the remaining lands allotted to the member, shall be known as surplus land, and shall be inalienable for twenty-five years, except as hereinafter provided."

The second section further provides (par. 7) that when any adult member is found fully competent to care for his own affairs the Secretary of the Interior may issue to him a certificate of competency authorizing him to sell and convey any of the lands deeded to him under the act other than his homestead, which where the certificate issues [1] is to remain inalienable for twenty-five years, or during the life of the homestead allottee. Other sections reserve to the tribe for twenty-five years the oil, gas, coal and other minerals in the allotted lands and provide that the tribal funds and moneys, with specified exceptions, shall be placed to the credit of the several members "shown by the authorized roll," or their heirs, on the basis of a pro rata division and shall be held in trust by the United States for twenty-five years. The sixth section is as follows:

"Sec. 6. That the lands, moneys, and mineral interests, herein provided for, of any deceased member of the Osage tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, or of the State in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband nor wife, in which case said lands, moneys, and mineral interests must go to the mother and father equally."

The seventh section shows that the allotted lands are for the sole use of the individual members, or their heirs, and that the same may be leased, subject to the restriction that to be effective "all leases," whether for the benefit of the individual members or their heirs, must have the

[1] See *Aaron* v. *United States*, 204 Fed. Rep. 943, 945-946.

approval of the Secretary of the Interior; and the eighth section provides that the deeds to allottees shall be executed by the principal chief of the tribe, but shall not be valid until the Secretary of the Interior approves them.

The Act of 1912, in its sixth section, treats the restraints applicable to living allottees as also applicable to such of the heirs of deceased allottees as are members of the tribe, and expressly provides that "when the heirs of such deceased allottees have certificates of competency . . . the restrictions on alienation are hereby removed."

Lah-tah-sah died without receiving a certificate of competency. Kenny and Miles, who claim to be her heirs, are of Osage blood and members of the tribe, and neither has received such a certificate. Thus the case differs materially from *Levindale Lead Co.* v. *Coleman*, 241 U. S. 432, where it was held to be obvious from an examination of the entire Act of 1906 that the restrictions on alienation were imposed to secure the welfare of Indians—wards of the United States—and were not intended to apply to lands, or undivided interests therein, inherited by white men who were not members of the tribe. There a white man, who as heir of a deceased Osage wife and child took an undivided interest in lands allotted in their behalf after their death, was held to have an unrestricted right to alienate his interest; but the court was careful to indicate that it was not dealing with the interests of Indian heirs.

The Act of 1906 makes it plain that all whose names were on the authentic roll were to share in the division of the tribal property. They were the "members" among whom the lands were to be allotted in stated portions. Lah-tah-sah, being one of them, was entitled to such an allotment. It was made in her name, but whether before or after her death is left uncertain by the record. The court below treated it as made after her death and held that the lands were not restricted, its decision being put

on the ground that the restrictions on alienation are not applicable to lands allotted in the right of deceased members, but only to such as are allotted to members living at that time. We cannot assent to that conclusion.

Under the Act of 1906 the death of a member entitled to an allotment does not extinguish his right. According to the implication of the act and the administrative rulings, the allotment still may be made in his name. Where this is done he is regarded as the allottee and his heirs as taking by descent from him. Such allotments and all others are made under one comprehensive provision, in which there is no distinctive mention of either living or deceased members. The restrictions are imposed by another provision equally comprehensive, and it makes no distinction between lands allotted to living members and those allotted in the right of deceased members. Nor is any such distinction made in the section dealing with descent. The heirs are generally Indians, and seldom white men. When they are Indians they are equally within the occasion for the restrictions, whether the allotment be to a living member or in the right of one deceased, *Talley* v. *Burgess*, 246 U. S. 104, 108; and in either case some may be without any allotment of their own, because born after the time for closing the roll. Thus those who take under allotments made in the right of deceased members are no less within the letter and spirit of the restrictions than are other heirs. That all are intended to be protected is shown by the leasing provision, which requires that "all leases" on the part of heirs shall have the approval of the Secretary of the Interior.

We, therefore, are of opinion that the lands allotted in Lah-tah-sah's name were restricted lands, whether allotted before or after her death.

The Act of 1906 is quite unlike the earlier acts considered in the cases of *Mullen* v. *United States*, 224 U. S. 448, and *Skelton* v. *Dill*, 235 U. S. 206, which are cited

in support of the conclusion below. Those acts, as was pointed out in our opinions, contained separate provisions for two classes of allotments—one to members living at the time, and the other in the right of deceased members. In the provisions dealing with the first class there were express restrictions on the right of alienation, and in those dealing with the second class there was an entire absence of such restrictions. Because of this difference in terms, we held that Congress intended that allotments of the second class should be unrestricted. The differences between those earlier acts and that of 1906 are pronounced and reasonably can be explained on no other theory than that Congress intended that all allotments under the Act of 1906 should be restricted, subject of course to the issue of certificates of competency. And that this is what was intended becomes even more manifest when it is considered that in the meantime Congress had imposed other restrictions in respect of allotments under the earlier acts and in doing so had discarded the distinction before made between the two classes of allotments so far as full-blood Indian heirs were concerned. *Talley* v. *Burgess, supra.*

We have seen that the provision in the Act of 1912 under which the partition suit was brought and entertained declares that where the lands are restricted, as was the case here, no partition or sale shall be valid until approved by the Secretary of the Interior. No approval was given in this instance. In consequence the judgment ordering a partition or sale—it had no other purpose—was inoperative. It could not be executed and was not binding on any one. The findings were part of it and were of no force apart from it.

It results that Kenny's protest against the use made of that judgment was well grounded.

Judgment reversed.

PARKER, AS SUPERINTENDENT FOR THE FIVE CIVILIZED TRIBES, ET AL. *v.* RILEY, A MINOR, BY STOCKTON, HER GUARDIAN, ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 254. Submitted March 19, 1919.—Decided May 19 1919.

Under § 9 of the Act of May 27, 1908, c. 199, 35 Stat. 312, the homestead of a full-blood Creek Indian who dies leaving a child born since March 4, 1906, is not freed from the restrictions on alienation by the death of the allottee, but is set apart for the "use and support" of such child during life, but not beyond April 26, 1931. P. 69.

Whether the special interest of the surviving child in such a case is, strictly speaking, an estate for life or for years, and what effect a removal of the restrictions on the homestead "in the manner provided in section one" of the act, after the death of the allottee, would have on the relative rights of such child and other heirs of the allottee, are questions not here considered. P. 70.

Where a child holding such a special estate under § 9 of the act joined the other heirs of the allottee, with the approval of the Secretary of the Interior, in leasing the allotment for oil and gas, upon a royalty basis, for the benefit of them all but without any provision for altering their rights *inter sese, held*, that, since the royalties took the place, *pro tanto*, of the land as the lessee extracted and took the minerals, the special estate attached to the royalties, and the child took the interest or income therefrom, while she lived, but not beyond April 26, 1931, leaving the principal, like the homestead, to go to the heirs in general on the termination of her special right. *Id.*

243 Fed. Rep. 42, reversed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Kearful for appellants.

Mr. William J. Horton and *Mr. Ralph A. Smith* for appellees.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a bill in equity to settle conflicting claims to royalties collected and accruing under an oil and gas lease of lands allotted to a full-blood Creek Indian as a homestead. The allottee died intestate in November, 1908, leaving a husband and two minor children as her only heirs. One of the children was born before and the other after March 4, 1906. Under the applicable law of descent each heir took an undivided one-third interest in the lands, subject to the estate specially given to the child born after March 4, 1906, by § 9 of the Act of May 27, 1908, c. 199, 35 Stat. 312. The lease was given in 1912 by the husband and children—the latter acting through their repective guardians—in accordance with the rules and regulations prescribed by the Secretary of the Interior, and was approved by that officer.[1] The royalties have been and are being regularly paid to an officer of the Indian Bureau under a provision in the lease, and he receives and holds them in trust for the lessors according to their respective interests. The District Court held that each heir was entitled to one-third of the royalties and directed that they be distributed on that basis. 218 Fed. Rep. 391. In the Circuit Court of Appeals that decree was affirmed, one judge dissenting. 243 Fed. Rep. 42.

It is insisted here, as it was in the courts below, that under § 9 of the Act of May 27, 1908, the child born after March 4, 1906, is entitled to all the royalties accruing during her life, but not beyond April 26, 1931, or, if not to the royalties, to the income or interest therefrom during that period.

The lands were allotted under the Acts of March 1, 1901, c. 676, 31 Stat. 861, and June 30, 1902, c. 1323, 32

[1] It was approved also by a local court.

Stat. 500, both of which provided that the homestead of each allottee should be inalienable for twenty-one years and on his death should remain for the use and support of his children, if any, born after the date which would entitle them to be enrolled and receive allotments of their own. By the Act of April 26, 1906, c. 1876, 34 Stat. 137, that date was changed to March 4, 1906, and as to certain allotments the restrictions on alienation were extended until April 26, 1931. With these matters in mind the provisions in the Act of May 27, 1908, relied on here, will be more readily understood.

By its first section that act relieves certain allotments from all restrictions, and then declares: "All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore." By its second section it provides: "That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise." By its fifth section it declares that "any attempted alienation" of lands while

they are restricted and "also any lease of such restricted land made in violation of law . . . shall be absolutely null and void." And its ninth section contains the following:

"That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: *Provided further*, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions."

The allottee, as has been said, was an enrolled full-blood Creek Indian and died several months after the Act of May 27, 1908. The restrictions on the alienation of her homestead had not been removed, and among her heirs was a child—a daughter named Julia—born after March 4, 1906. In these circumstances a reading of section nine makes it very plain that the restrictions did not terminate with the allottee's death but remained in force, and also that the homestead was set apart for the

"use and support" of Julia during her life, but not beyond April 26, 1931. We need not stop to consider whether, strictly speaking, the right thus specially given to Julia was an estate for life or for years, for it evidently was not the purpose to make any nice distinctions along that line. Nor need we consider what effect a removal of the restrictions "in the manner provided in section one" after the death of the allottee would have had on the relative rights of Julia and the other heirs, for no such removal was attempted or intended by the Secretary of the Interior.

The oil and gas lease was to run for ten years and as much longer as oil or gas was found in paying quantity. It was given and approved under the provision in section two dealing specially with the leasing of restricted lands and homesteads. All the heirs joined in the lease and it was designed to be for the benefit of all. Nothing in it or in the provision under which it was given suggests that the rights of the heirs, as among themselves, were to be altered or affected. The oil and gas were to be extracted and taken by the lessee, and for this royalties in money were to be paid. These minerals were part of the homestead and the lease was to operate as a sale of them as and when they were extracted. In that sense the heirs were exchanging a part of the homestead for the money paid as royalties, but no heir was surrendering any right to the others. Thus the rights of all in the royalties were the same as in the homestead. Nothing in the Act of May 27, 1908, makes to the contrary. Under the provision in section nine specially providing for issue born after March 4, 1906, Julia was entitled for her support to the exclusive use of the entire homestead while she lived, but not beyond April 26, 1931, and those who took the fee took it subject to that right. The rights of all in the royalties must, as we think, be measured by that standard. In this view Julia is entitled to the use of the royalties, that is to say, the interest or income which may be ob-

tained by properly investing them, during the same period, leaving the principal, like the homestead, to go to the heirs in general on the termination of her special right.

Our conclusion on this point is in accord with the general trend of decisions in the oil and gas mining regions in similar situations. *Blakley* v. *Marshall*, 174 Pa. St. 425, 429; *Wilson* v. *Youst*, 43 W. Va. 826; *Eakin* v. *Hawkins*, 52 W. Va. 124; *Stewart* v. *Tennant*, 52 W. Va. 559; *Barnes* v. *Keys*, 36 Oklahoma, 6.

Decrees below reversed.

RUST LAND & LUMBER COMPANY v. JACKSON ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 171. Argued March 4, 1919.—Decided May 19, 1919.

The contention that an issue between private parties involving the location of the state boundary was submitted to the jury upon a theory inconsistent with the true principle of decision as laid down by this court, and that thereby a party was deprived of a right, privilege or immunity claimed under the Constitution and treaties of the United States, will not afford ground for a writ of error to review the judgment of a state court under Jud. Code, § 237, as amended. P. 73.

The claim that the decision of an original suit between two States pending in this court for the determination of their common boundary will be determinative of private rights to timber, involved in a case between private parties pending in the Supreme Court of one of such States, and that a party to the latter case will be entitled to set up such decision when rendered and is entitled to a continuance meanwhile, *held*, at most, an assertion of a title, right, privilege or immunity under the Federal Constitution; and the refusal of such continuance by the state court *held* to involve no question as to the jurisdiction of this court to render a conclusive judg-

ment in the suit between the States, locating their boundary, and hence no question as to the validity of "an authority exercised under the United States" within the meaning of Jud. Code, § 237, as amended. P. 74.

An application for certiorari to review a judgment of a state court cannot be entertained after the three months' period limited by § 6 of the Act of September 6, 1916, has expired. P. 76.

Writ of error dismissed. Certiorari denied.

THE case is stated in the opinion.

Mr. Albert M. Kales and *Mr. Herbert Pope* for plaintiff in error.

Mr. Garner W. Green, with whom *Mr. Gerald Fitzgerald*, *Mr. George F. Maynard* and *Mr. Marcellus Green* were on the briefs, for defendants in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

This case was brought on for argument immediately following *Arkansas* v. *Mississippi*, No. 7, Original, this day disposed of, *ante*, 39.

It was a replevin suit, brought in the circuit court of one of the counties of Mississippi by defendants in error to recover certain timber taken by plaintiff in error from their possession under a claim of ownership. They recovered a verdict and judgment in the circuit court, and the judgment was affirmed by the Supreme Court of the State, without opinion. Ownership of the timber was deemed to depend upon the ownership of the land from which it had been cut; and this was in dispute, and according to the theory of plaintiff in error was dependent upon the location of the state boundary. The land lay in the Mississippi River bottom, in the vicinity of Horseshoe Bend, where a portion of the former channel had been abandoned as the result of a sudden change that occurred in the year

1848; the river having broken through the neck of the Bend and formed a new channel there, with the result that in the course of time the former channel around the Bend was abandoned and in large part filled up, and its location as it was prior to the avulsion has become, after the lapse of so many years, difficult of ascertainment. The adjoining States whose common boundary is marked by the River at this point are in dispute as to its former location, and also as to whether the boundary ought to follow the middle of the former main channel of navigation or rather a line equidistant from the banks of the River at ordinary stage of water. To determine this controversy, the suit between the States was brought in this court, and it is still pending.

It is the contention of plaintiff in error that the judgment in the present case was based upon the determination of an issue which necessarily involved the location of the interstate boundary; and our first inquiry must be whether the judgment of the Supreme Court of Mississippi herein is reviewable in this court by writ of error. The judgment was rendered December 23, 1916, after the taking effect of the Act of September 6, 1916, c. 448, 39 Stat. 726, amendatory of § 237, Judicial Code, and hence is reviewable here, if at all, only by virtue of that act and in accordance with its provisions.

It is asserted that the issue involving the location of the boundary line between the States was submitted to the jury under instructions from the trial judge based upon a theory inconsistent with the true principle of decision as laid down by this court in *Iowa* v. *Illinois*, 147 U. S. 1; *Arkansas* v. *Tennessee*, 246 U. S. 158, and *Cissna* v. *Tennessee*, 246 U. S. 289, and that thereby plaintiff in error was deprived of a right, privilege, or immunity claimed under the Constitution of the United States and treaties made thereunder. Even if the record showed that such a right, privilege, or immunity was properly set up

and claimed in the state court, it of course is not maintained, nor could it be, that under § 237, Judicial Code, as amended, a federal question of this character would give us jurisdiction to review the resulting judgment by writ of error. Were that the only federal question, clearly it would at most furnish ground for a review by certiorari.

But it is insisted that the Supreme Court of the State, in the course of its review of the judgment of the circuit court, rendered an adverse decision upon the question of the validity of an authority exercised under the United States, and for this reason we have jurisdiction by writ of error under the amended § 237.

The question arose as follows: Plaintiff in error moved the Supreme Court to continue the cause until the decision by this court of the original action then and still pending between the States of Arkansas and Mississippi, in which the location of the disputed boundary at or near the land in question is involved. This motion at first was sustained; but afterwards the defendants in error moved to set aside the continuance upon these grounds: (1) That the decision of this court in the suit between the States would not be controlling in the present case because it would not be rendered upon the same testimony; (2) That the Supreme Court of Mississippi was an appellate tribunal without original jurisdiction, empowered only to affirm or reverse a decision of the circuit court, depending upon whether that court upon the evidence before it had reached a correct conclusion, and that there was no way in which the judgment of this court in the suit between the States could be introduced before the Supreme Court of Mississippi; and (3) Because the latter court was not in any way subject to the final jurisdiction of this court. This motion was sustained, the continuance was set aside, and the cause was placed upon the docket and afterwards disposed of in its regular order; with the result, as is maintained, that final judgment was rendered upon an

erroneous theory respecting the location of the interstate boundary line.

It is the contention of plaintiff in error that by the last-mentioned motion the validity of the authority of this court to determine the issues involved in the suit between the States was drawn in question, and that the decision of the Supreme Court of Mississippi was against its validity.

We do not, however, regard the ruling of the state court as having involved the authority or jurisdiction of this court to render a conclusive decision in the suit between the States respecting the location of the boundary line; and hence do not consider that there was any question concerning the validity of "an authority exercised under the United States" within the meaning of § 237. The question raised involved merely the consequences that were to flow from the exercise of an admittedly valid authority under the United States, that is to say, the effect upon the rights of third parties of a particular exercise by this court of its constitutional jurisdiction over a controversy between two States; the concrete questions being (*a*) whether, in the event that our decision should be adverse to the State of Mississippi—and therefore, according to the theory of plaintiff in error, inconsistent with the title of its opponents—plaintiff in error would be entitled to set up that decision and judgment as conclusive against defendants in error; and (*b*) whether, in aid of such right, plaintiff in error was entitled to have the suit against it in the state court stayed to await our decision in the suit between the States. In effect, the contention was that the original jurisdiction conferred by the Constitution upon this court in controversies between States was of such a nature as to render our decree made in a suit of that kind binding upon private parties asserting opposing claims to lands in the disputed territory, and to prevent such private parties from prosecuting their liti-

gation in a state court pending our determination of the suit between States. In setting up this contention plaintiff in error did no more than assert a title, right, privilege, or immunity under the Constitution of the United States. This, at most, afforded ground for an application to this court for a review of the resulting judgment by certiorari, but not for a writ of error. The case of *Cissna* v. *Tennessee*, 242 U. S. 195; 246 U. S. 289, 293, in which a similar question was raised but not passed upon, was brought to this court by writ of error, but before § 237, Judicial Code, was amended by the Act of 1916. The present writ of error must be dismissed.

On the eve of the argument a writ of certiorari was applied for; but as this was long after the expiration of the three months limited by § 6 of the Act of September 6, 1916, the application cannot be entertained, irrespective of whether the record shows a proper case for the allowance of that writ.

Writ of error dismissed.
Application for writ of certiorari denied.

FILLIPPON *v.* ALBION VEIN SLATE COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 241. Argued March 18, 1919.—Decided May 19, 1919.

In response to an inquiry from the jury, who had retired to consider of their verdict, the trial court sent them a supplementary instruction in writing on a question of contributory negligence. *Held* error, the parties and their counsel being absent and no opportunity being given them either to be present or to make timely objection. P. 80.

An opportunity afterwards to except to an instruction and to the manner of giving it is not equivalent to an opportunity to be present during the proceedings, since the prime and essential function of an exception is to direct the mind of the trial judge to the point in question so that he may reconsider and change his ruling if convinced of error. P. 81.

In jury trials erroneous instructions are presumptively harmful. P. 82.

An erroneous instruction may neutralize a correct one on the same subject and introduce material error. P. 83.

Under the law of Pennsylvania, a servant who goes on with perilous work under the peremptory orders of his master, although knowing the attendant danger and having time to consider, is not guilty of contributory negligence unless he knows, or has reason to suppose, that the danger is inevitable or imminent. P. 82.

242 Fed. Rep. 258, reversed.

THE case is stated in the opinion.

Mr. Calvin F. Smith, with whom *Mr. J. Willard Paff* was on the brief, for petitioner.

Mr. Ralph B. Evans for respondent.

MR. JUSTICE PITNEY delivered the opinion of the court.

This case involves an important question of trial practice. It was an action brought by Fillippon, a citizen of Italy and a subject of the King of Italy, against the Slate Company, a Pennsylvania corporation doing business in that State, to recover damages for personal injuries sustained by plaintiff while in the employ of defendant, due as alleged to the negligence of defendant's foreman or superintendent under whom plaintiff was working. The grounds of negligence alleged were the failure to furnish a reasonably safe place for the work, failure to warn plaintiff of latent dangers of the work and the dangerous method of doing it, and specifically that plaintiff was directed to do the work in a particular manner under orders and

instructions of defendant's foreman, to which plaintiff was bound to conform. There was a general plea of not guilty and a trial by jury. The evidence showed that the occurrence took place July 31, 1914, while plaintiff was at work in an open quarry under the direction of a foreman or superintendent and as one of a gang consisting of four quarrymen or blockmen besides plaintiff who assisted them as an ordinary laborer or "rubbish hand." It appeared that by the usual method of work, with which plaintiff was familiar, after a block of slate has been blasted out it is raised by crowbars and by wedges of wood or iron placed beneath it, in order that chains may be placed about it to which the hoisting tackle is made fast. In case the block is small the wedges are placed by the workman's hand, it not being necessary to insert them beyond the edge of the block. In case of large blocks, the wedges are put in by hand so far as this can be done without placing the hand beneath the block, and then a stick or the handle of a tool is employed in order to push the wedge farther in, the workman being thus protected from injury in case the stone should happen to slip or drop. Plaintiff's duty as rubbish hand was that of a general utility man, expected to do whatever the foreman or superintendent might direct. On the occasion in question a large block had been blasted out and was being raised in order that chains might be put about it. Plaintiff was assisting, and had inserted a wedge as far as he could push it without putting his hand beneath the stone, but it was necessary that the wedge should be pushed farther in, and he, being afraid that if he did this with his hand the block might fall upon his arm, told the foreman or superintendent that he wanted to get something with which to push the wedge. Instead of consenting, the foreman ordered him to "go ahead, go ahead," and in obedience to this he put his right hand beneath the block, when with a sudden movement the block came down on

his arm and crushed it so that amputation was necessary.

The trial judge submitted the question of defendant's negligence and of plaintiff's contributory negligence to the jury, saying, in his principal charge, among other things: "When a man accepts employment he assumes also with it the ordinary risk incident to such employment, and if you find the circumstances or situation in which the plaintiff found himself at the time of the accident, or that his performance leading up to the injury was of ordinary occurrence, then you may conclude that he had assumed the risk of the accident that has befallen him, and he cannot recover; but on his part it is contended that the situation in which he found himself at the time when the stone or slate block, properly speaking, was suspended or lifted by the men was of an extraordinary character, that the plaintiff when about to place the iron wedge found the stone or block large, and threatening danger, as he believed, whereupon he was suddenly and hastily summoned and directed to act by the foreman, whereupon he had but little or no time to judge of his own safety, and yielding to the judgment of his superior he acted. Now, if you find the facts as contended for by the plaintiff, I will ask you to say whether he was guilty of contributory negligence under the circumstances. Could he have protected or saved himself by the use or exercise of ordinary care? If he is to blame in part, or has in any manner contributed to his injury, he is not entitled to your verdict. The rule in negligence cases is, that while the defendant is held to exercise due and reasonable care under the circumstances, the plaintiff is also held to exercise the same degree of care, and if he does not do so, he cannot recover. Of course, if the master gives positive orders to go on with the work, under perilous circumstances, the servant may recover for an injury thus incurred, if the work was not inevitably or imminently dangerous. If the danger was

imminent that faced the plaintiff, and he in the face of it did the thing that he knew, as a reasonably careful man, under the circumstances, was dangerous, he is guilty of contributory negligence and cannot recover."

The bill of exceptions shows that after the trial judge had completed his instructions and the jury had retired for deliberation, and while they were deliberating, the jury sent to the judge the following written inquiry: "Whether the plaintiff in pushing the wedge beneath the block of slate with his hand, having full knowledge of the risk involved, thereby became guilty of contributory negligence, even though told by Foreman Davis to 'push it under.'" To which the trial judge replied by sending the following written instruction to the jury room, in the absence of the parties and their counsel, without their consent, and without calling the jury in open court: "If he was told to put it under as stated by the plaintiff and he did so, fully appreciating at the time the danger attending and having sufficient time to consider, when he was face to face with a situation that would have made a reasonably prudent man to disobey the orders of the foreman, notwithstanding, and he went ahead in spite of the dangers known to him and apparent, he is guilty of contributory negligence."

To this action of the court plaintiff excepted at the first opportunity upon grounds that raise two questions: (a) Whether it was erroneous to give this supplementary instruction in the absence of the parties and without calling the jury in open court, and (b) whether the instruction so given was erroneous.

The jury having returned a verdict in favor of defendant, and a motion for a new trial having been denied, the resulting judgment was brought under the review of the Circuit Court of Appeals and there affirmed. 242 Fed. Rep. 258. Thereupon this writ of certiorari was allowed.

76. Opinion of the Court.

We entertain no doubt that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict. Where a jury has retired to consider of its verdict, and supplementary instructions are required, either because asked for by the jury or for other reasons, they ought to be given either in the presence of counsel or after notice and an opportunity to be present; and written instructions ought not to be sent to the jury without notice to counsel and an opportunity to object. Under ordinary circumstances, and wherever practicable, the jury ought to be recalled to the court room, where counsel are entitled to anticipate, and bound to presume, in the absence of notice to the contrary, that all proceedings in the trial will be had. In this case the trial court erred in giving a supplementary instruction to the jury in the absence of the parties and without affording them an opportunity either to be present or to make timely objection to the instruction. See *Stewart* v. *Wyoming Ranche Co.*, 128 U. S. 383, 390; *Aerheart* v. *St. Louis, I. M. & S. Ry. Co.*, 99 Fed. Rep. 907, 910; *Yates* v. *Whyel Coke Co.*, 221 Fed. Rep. 603, 608; and many decisions of the state courts collated in 17 L. R. A., N. S., 609, note to *State of North Dakota* v. *Murphy*, 17 N. Dak. 48.

The Circuit Court of Appeals considered that the jury had asked a plain question in writing concerning a matter of law, and the judge had answered it in writing plainly and accurately, and were of the opinion that since nothing else had occurred—the question and answer having been preserved of record and counsel having been promptly notified of what had taken place and given the opportunity of excepting to the substance of the instruction and to the manner of giving it—no harm had been done, and none

was probable to arise under like circumstances, and hence affirmed the judgment.

It is not correct, however, to regard the opportunity of afterwards excepting to the instruction and to the manner of giving it as equivalent to an opportunity to be present during the proceedings. To so hold would be to overlook the primary and essential function of an exception, which is to direct the mind of the trial judge to the point in which it is supposed that he has erred in law, so that he may reconsider it and change his ruling if convinced of error, and that injustice and mistrials due to inadvertent errors may thus be obviated. *United States* v. *U. S. Fidelity Co.*, 236 U. S. 512, 529; *Guerini Stone Co.* v. *Carlin Construction Co.*, 248 U. S. 334, 348.

And of course in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless.

In this case, so far from the supplementary instruction being harmless, in our opinion it was erroneous and calculated to mislead the jury in that it excluded a material element that needed to be considered in determining whether plaintiff should be held guilty of contributory negligence under the particular hypothesis referred to in the jury's question.

The case was governed by the law of Pennsylvania, where the injury was received and the trial took place. Rev. Stats., § 721. The law of that State, as it stood when the cause of action arose [1] is expressed in repeated decisions of its court of last resort to the following effect: "Where the servant, in obedience to the requirement of the master, incurs the risk of machinery, which though dangerous, is not so much so as to threaten immediate injury, or where it is reasonably probable it may be safely

[1] See Workmen's Compensation Act of 1915, Pa. Laws 1915, p. 736.

used by extraordinary caution or skill, the rule is different. In such case the master is liable for a resulting accident." And, with reference to the particular circumstances of the case there under consideration: "If the defect was so great, that obviously, with the use of the utmost skill and care, the danger was imminent, so much so, that none but a reckless man would incur it, the employer would not be liable." *Patterson* v. *Pittsburg & Connellsville R. R. Co.*, 76 Pa. St. 389, 394. "If the master gives the servant to understand that he does not consider the risk one which a prudent person should refuse to undertake, the servant has a right to rely upon his master's judgment, unless his own is so clearly opposed thereto that, in fact, he does not rely upon his master's opinion. A servant is not called upon to set up his own unaided judgment against that of his superiors, and he may rely upon their advice and still more upon their orders, notwithstanding many misgivings of his own. The servant's dependent and inferior position is to be taken into consideration; and if the master gives him positive orders to go on with the work, under perilous circumstances, the servant may recover for an injury thus incurred, if the work was not inevitably and imminently dangerous." *Williams* v. *Clark*, 204 Pa. St. 416, 418. To the same effect, *Glew* v. *Pittsburgh Railways Co.*, 234 Pa. St. 238, 242, 243; *Moleskey* v. *South Fork Coal Mining Co.*, 247 Pa. St. 434, 437, 438.

In the present case the trial judge recognized this to be the applicable rule of law when orignally instructing the jury, for he said: "Of course, if the master gives positive orders to go on with the work, under perilous circumstances, the servant may recover for an injury thus incurred, if the work was not inevitably or imminently dangerous." But this was neutralized, and the jury probably led astray, when in the supplementary instruction they were told, in effect, that if, when plaintiff obeyed the foreman's order by putting the wedge beneath the heavy

block of slate with his hand, he fully appreciated the attendant danger and had sufficient time to consider, and if the situation was such as would have made a reasonably prudent man disobey the order, and he went ahead in spite of the dangers known to him and apparent, he was guilty of contributory negligence. The effect of this was to bar a recovery if the plaintiff knew of the attendant danger, although he did not know or have reason to suppose that the danger was inevitable or imminent, that is, immediately threatening. We suppose it hardly could have been a point in dispute that plaintiff knew that the operation of pushing the wedge beneath a large block of slate with his hand was dangerous, for he was familiar with the work, knew what safeguard was customarily taken against this danger, expressed a fear of it upon the particular occasion, and requested time to get an implement to be used for his safety according to the custom. It was at this precise moment, according to the testimony, that the foreman or superintendent told him to "go ahead, go ahead"; and under the Pennsylvania decisions he was entitled to rely upon the judgment and order of his superior if the work was not inevitably and imminently dangerous; that is, threatening immediate injury upon the particular occasion. The jury very reasonably might conclude that neither plaintiff nor the foreman believed or had reason to believe that the work was inevitably and imminently dangerous; but if it was not, he was entitled, under the Pennsylvania decisions, to hold his employer responsible for the consequences of what he did under peremptory orders of the foreman, although he (the plaintiff) fully appreciated the general dangers, had time to consider, and went ahead notwithstanding.

The judgment under review will be reversed, and the cause remanded to the District Court for further proceedings in conformity with this opinion.

NEW YORK CENTRAL RAILROAD COMPANY v. GOLDBERG.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 256. Argued March 20, 1919.—Decided May 19, 1919.

Under an interstate bill of lading providing that the owner or consignee shall pay the freight and all other lawful charges on the property, and, that if upon inspection it is ascertained that the articles shipped are not those described in the bill the freight charges must be paid upon the articles actually shipped, *held*, that an innocent misdescription of the goods, placing them in a class entitled to a lower rate under the carrier's filed schedules, merely imposed upon the shipper or consignee an obligation to pay freight charges according to their true character, and did not affect the liability of the carrier for a failure to deliver, there being no clause exempting the carrier or limiting its liability in case of such misdescription.

164 App. Div. 389, 221 N. Y. 539, affirmed.

THE case is stated in the opinion.

Mr. William Mann, with whom *Mr. Charles C. Paulding* was on the brief, for petitioner.

No appearance for respondent.

MR. JUSTICE PITNEY delivered the opinion of the court.

This was an action brought by respondent against petitioner in the Supreme Court of New York to recover damages equivalent to the value of certain goods shipped in interstate commerce and lost in transit. Plaintiff had judgment in the trial court, which was affirmed by the Appellate Division for the First Department (164 App.

Div. 389), and affirmed by the Court of Appeals without opinion. [221 N. Y. 539.]

The facts are as follows: On September 17, 1912, a firm of fur manufacturers in New York City caused to be delivered to defendant there for transportation to plaintiff at Cincinnati, Ohio, a case containing furs belonging to plaintiff of the value of $693.75. When the case left the consignors' possession it was marked with the name and address of the consignee, and with the word "furs" conspicuously displayed. It was delivered to a local expressman, whose driver delivered it to defendant and made out a bill of lading which defendant signed and upon which the action depends. This bill of lading described the goods as "One case D. G.," which admittedly means "dry goods." The misdescription was the driver's mistake, not made with any intent to fraudulently misrepresent the nature of the merchandise shipped. Defendant's clerk who signed the bill of lading relied wholly upon the representations of the driver as to the contents of the case, not seeing the case itself; and, so far as appears, no representative of defendant compared or had a convenient opportunity to compare the bill of lading with the marks on the case. At the time of the shipment the official freight classification filed with the Interstate Commerce Commission provided for a first-class rate for dry goods (65 cents per hundred pounds), and a double-first-class rate ($1.30 per hundred) for furs. As a result of the misdescription in the bill of lading, freight was charged at the smaller rate applicable to dry goods, instead of the higher one applicable to furs. No valuation was placed upon the goods, and no question of limitation of liability to a stipulated value is presented.

Defendant admitted that it received the goods for transportation, and that they were stolen in transit and never delivered to the consignee.

Defendant insists that it is not liable in any amount

for loss of the goods, because they were misdescribed in the bill of lading. Reliance is placed upon a line of decisions in this court relating to the limitation of liability of an interstate rail carrier where goods are shipped at a declared value at a rate based upon value and under a contract conforming to the filed tariff. *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 509; *Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639, 650, *et seq.*; *Missouri, Kansas & Texas Ry. Co.* v. *Harriman*, 227 U. S. 657, 670; *Great Northern Ry. Co.* v. *O'Connor*, 232 U. S. 508, 515; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Robinson*, 233 U. S. 173, 180; *Southern Ry. Co.* v. *Prescott*, 240 U. S. 632, 638.

The Appellate Division held that these cases did not go to the extent of relieving the carrier from all liability in case of a non-fraudulent misrepresentation as to the nature of the merchandise shipped, and that since there was no clause in the bill of lading exempting the carrier or limiting its liability in case of such a misdescription the carrier was defenseless.

Defendant's contention is that there is no responsibility for loss of the furs that were shipped because they were goods not of the same but of a different character than those described in the bill of lading, and were goods for the transportation of which a higher rate was established by its filed schedules. Were there otherwise any difficulty in answering this contention, it would be wholly relieved by the fact that the precise contingency was anticipated in the preparation of the form of the bill of lading and provided for by one of its conditions, which reads as follows: "The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped."

Clearly, the effect of this is that a misdescription of the

character of the goods, not attributable to fraud, merely imposed upon the shipper or consignee an obligation to pay freight charges according to the character of the goods actually shipped, and did not affect the liability of the carrier for a failure to deliver the goods.

Judgment affirmed.

BROTHERS *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 309. Argued March 28, 1919.—Decided May 19, 1919.

An unliquidated claim against the United States, under the Act of June 25, 1910, c. 423, 36 Stat. 851, for the alleged infringement of a patent is not assignable with the patent. Rev. Stats., § 3477. P. 89.

The essential feature of patent No. 551,614, granted to Sarah E. Brothers et al. for "improvements in cable cranes with gravity anchors," is a non-yielding support or anchor at one end of the cable, and a yielding, tilting, or rocking support at the opposite end, consisting of outwardly inclined shears or some equivalent structure held movably at the base, and a counterweight on the outer side. *Id.*

This patent was not infringed by the use of cableways supported by two towers both of which were intended and constructed to be rigid, but both of which, upon the tightening of the cables, done for the purpose of enabling the loads to clear the work as its height increased, acquired a tendency to yield with the yielding of the railroad bed beneath them, under the increased stress. P. 93.

Findings of the Court of Claims are to be treated like the verdict of a jury, and this court is not at liberty to refer to the evidence, any more than to the opinion, for the purpose of eking out, controlling or modifying their scope. *Id.*

52 Ct. Clms. 462, affirmed.

THE case is stated in the opinion.

Mr. William F. Brothers pro se.

Mr. Assistant Attorney General Frierson, for the United States, submitted.

MR. JUSTICE PITNEY delivered the opinion of the court.

Appellant brought this action in the Court of Claims under the Act of June 25, 1910, c. 423, 36 Stat. 851, to recover compensation for the unlicensed use by the United States in the Panama Canal work of his patented invention for "Improvements in cable cranes with gravity anchors." That court made findings of fact upon which it concluded as matter of law that there was no infringement of claimant's patent, and thereupon dismissed his petition. 52 Ct. Clms. 462.

From the findings it appears that claimant filed application for his patent July 18, 1895, and, upon such application, letters patent No. 551,614 were granted and issued, under date December 17, 1895, to his assignees Sarah E. Brothers and Maria A. Brown, to whom he had made assignment pending the application. Subsequently the letters patent were assigned to claimant, under date October 2, 1912, two and one-half months prior to their expiration by limitation on December 17, 1912. His claim to compensation is necessarily limited to this brief period, since there could be no assignment to him of any unliquidated claim against the Government arising prior to the time he became the owner of the patent. Rev. Stats., § 3477.

No question is made but that plaintiff's invention was broadly new, a pioneer in its line, and the patent entitled to a broad construction and the claims to a liberal application of the doctrine of equivalents. (See *Brothers* v. *Lidgerwood Mfg. Co.*, 223 Fed. Rep. 359.) It relates to the method of erecting and operating a suspension

cable adapted to carrying a traveling crane or the like. Roughly speaking, the prior art consisted in supporting such cables upon rigid and unyielding towers at each end, so as to prevent an undue sagging of the cable under the strain of its load. Claimant's invention consisted in employing a rigid support or abutment at one end of the cable and what is called a "gravity anchor" at the opposite end, consisting of outwardly inclined shears with the cable attached thereto and a weight hung permanently from the shears on the opposite side, which weight, together with the weight of the shears, puts a tension upon the cable varying according to the weight of the structure and counterweight, combined with the degree of inclination of the structure; the operation of the tension device being automatically to take up the slack of the suspended cable when the load approaches the supports, with the result of permitting the load to be moved closer to the supports, with a given exertion of power, than before. There are other advantages not necessary to be specified. The essential feature of the patent is a non-yielding support or anchor at one end of the cable, and a yielding, tilting, or rocking support at the opposite end, consisting of outwardly inclined shears or some equivalent structure held movably at the base, and a counterweight on the outer side. It is to be observed that rigidity of the head tower is a *sine qua non*, necessary to produce tension of the cable; yielding supports at both ends would be a contradiction of terms, since with such an arrangement there would be no support, and the entire structure would collapse under its own weight. The importance of this will appear.

In the construction of the Panama Canal the Government installed in the year 1909, and maintained and used continuously thereafter until the expiration of the Brothers patent, one single cableway and six duplex or double cableways which are complained of in this case

as infringements. As to the mode of construction, maintenance, and operation of these cableways, the findings of the Court of Claims are as follows:

"The single and the duplex cableways were similar in general design and construction except that the towers of the former supported a single cable, while those of the latter supported two cables, parallel to each other, at a distance of 18 feet apart, and each operated independently of the other, the length of the towers longitudinally of the canal cut being of proportionate dimension for the accommodation of the two cables. The towers were of structural steel construction; and taking the duplex cableways for illustration, each tower in vertical cross section from front to rear was in the shape of a right-angle triangle, with a base of approximately 50 feet, a perpendicular or vertical height of about 85 feet, and a hypothenuse of about 98 feet, with a length of about 38 feet longitudinally of the canal. The two towers of the cableway stood facing each other, on opposite banks of the canal cut, with their hypothenuse faces toward the cut. The cable span across the cut between the tops of the towers was approximately 800 feet. The cables used were 2¼-inch steel-wire cables having a rated breaking stress of 200 tons. The cables were supported by headblocks or saddles at the tops of the towers, and their ends were carried down and firmly anchored to the counterweighted bases of the towers.

"Rigidity of the towers was desired; and in order to secure this and hold the towers rigid against any tendency to tip, tilt, or yield under the stress of the suspended cables and their loads, the platform base at the rear side of each tower—that is, the side farthest from the canal cut—was counterweighted by a block of cement concrete of over 150 tons weight, cast about the structural steel members of the base of the tower and extending along practically the entire length of the base. The entire

weight of each tower, including the tower proper, the trucks upon which it was mounted, and the concrete counterweight, was upward of 500 tons.

"To facilitate the shifting or moving of the cableways along the canal cut as the work progressed each tower was mounted upon sets of trucks, similar to the trucks of railway cars, on the front and rear sides of the base of the tower, and the whole structure was mounted upon two standard-gauge railway tracks located on the bank of the canal cut at the proper distance from each other and from the similar tower tracks on the opposite bank of the cut.

"The cableways were operated by electrical power from the machinery stations in the head tower of each cableway.

"Subsequent to the construction and installation of said cableways they were maintained and operated without change in structural form or method of operation other than that as the height of the walls and other work of the canal increased, beginning about August, 1910, it became necessary, in order to admit of the loads being carried to pass clear of the works and men engaged thereon as the height of the work increased, to take up the slack or decrease the deflection of the cable. The cables were accordingly drawn up for said purpose. This tightening up of the cables or reduction of their deflection increased the effect of the load and weight of the cables upon the towers as regards their tendency to yield or tilt.

"It was the intent and purpose of the engineer officers of the Canal Commission, by and under whom said cableways were designed, constructed, and operated, that the towers thereof should be rigid and nonyielding to the full extent that rigidity in cable towers was possible; and there was no tilting or yielding of said towers other than such as resulted from a yielding of the roadbed of the tracks supporting them, portions of which roadbed con-

sisted of 'fills' of excavated materials upon swampy ground. There is no satisfactory evidence that the towers either yielded or tilted at any time during the period of claimant's ownership of said letters patent."

Upon the argument here, appellant quoted somewhat amply from the evidence taken before the Court of Claims. For the purposes of our review the findings of that court are to be treated like the verdict of a jury, and we are not at liberty to refer to the evidence, any more than to the opinion, for the purpose of eking out, controlling, or modifying their scope. *United States* v. *Smith*, 94 U. S. 214, 218; *Stone* v. *United States*, 164 U. S. 380, 382; *District of Columbia* v. *Barnes*, 197 U. S. 146, 150; *Crocker* v. *United States*, 240 U. S. 74, 78, and cases cited.

We concur in the opinion of the Court of Claims that no infringement of claimant's patent is shown. In the Act of June 25, 1910, under which this suit is brought and under which alone it could be brought, it is expressly provided that there shall be no such suit "based on the use by the United States of any article heretofore owned, leased, used by, or in the possession of the United States." In view of this and of the fact that the cableways complained of were theretofore in the possession of and used by the United States, claimant insists that after the passage of the act the Government materially altered the cableways in such a manner as to make them infringe his patent. The contention is that the cables were tightened up in order to decrease their deflection, and that this tightening, in view of the loads carried by the cables, caused the supporting towers to yield or tilt, and thus to become in essence movable towers like the gravity anchors covered by the claimant's patent. But, as pointed out by the Court of Claims, it is beyond question that, as constructed and used generally, and as intended to be used, the Government cableways did not infringe claimant's device. The subsequent tightening of the cables was done

in the orderly conduct of the work for the purpose of carrying the loads over and free from the work that was being constructed. So far as this caused a yielding of the tower under the stress of the load, it was an incidental result, affecting or tending to affect the towers on both sides, and not upon one side to the exclusion of the other. It did not amount to a mechanical equivalent of the claimant's structure; there is no semblance of an outward inclination of a yielding tower or yielding support, but rather a tendency on the part of rigid towers to break down or collapse inwardly under an undue stress. And, as we have shown, the rigidity of one support is as essential to claimant's structure as is the movability of the other.

Inasmuch as the findings fully support the judgment of the court below, its judgment must be and it is

Affirmed.

MACKAY TELEGRAPH & CABLE COMPANY *v.* CITY OF LITTLE ROCK.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 374. Motion to dismiss or affirm submitted March 3, 1919.—Decided May 19, 1919.

A telegraph company, although engaged in interstate business and under the restrictions and obligations of the Post Roads Act of July 24, 1866, is subject to reasonable taxes imposed by a city upon the maintenance of poles and wires erected and maintained by the company within the limits of the city under authority granted by its ordinances. P. 99.

Inasmuch as one legitimate object of such a tax is to recoup the special cost of governmental supervision and regulation, it is not a valid objection that it extends to poles standing on a railroad right of way,

or that some of these were brought within the city limits after the company accepted its special franchise ordinance, in a case where local governmental supervision is necessary for the protection of travelers on highways crossed by the telegraph line on such right of way. *Id.*

There is no support in the record for the contention that a tax of fifty cents per pole per year is unreasonable in amount, even though it be made to apply to poles standing on private property or upon a railroad right of way as well as to poles erected in the streets. P. 100.

Where the "pole tax" imposed by franchise ordinance on one company is the same as is imposed by general ordinance on other companies, the fact that, as to poles on railroad rights of way, the tax sought to be enforced against the one company has not been enforced against the others does not prove a denial of the equal protection of the laws, without proof of arbitrary and intentionally unfair discrimination or that the circumstances of the companies and their lines were so much alike as to render any discrimination unreasonable. *Id.*

131 Arkansas, 306, affirmed.

THE case is stated in the opinion.

Mr. James W. Mehaffy, for defendant in error, in support of the motion.

Mr. J. C. Marshall, for plaintiff in error, in opposition to the motion.

MR. JUSTICE PITNEY delivered the opinion of the court.

This case was submitted on a motion to dismiss or affirm. The facts are as follows: On March 11, 1912, the city council of Little Rock passed an ordinance granting to the telegraph company the right to construct and maintain telegraph poles, wires, and fixtures and to install underground ducts and manholes along and over certain streets in the city particularly mentioned, including the following: "Also a line of poles and fixtures and the right to string wires or cables thereon, beginning at the intersection of East Second Street and Rector Avenue and running thence on the west side of Rector Avenue to East

Sixth; thence east on the north side of Sixth to the Chicago, Rock Island & Pacific Railway tracks. From this point the pole line will follow on and along the right of way of said railway to the south city limits." Among other things the ordinance provided that the company should pay to the city immediately upon the completion of the line, and annually thereafter, "a license or tax of fifty cents for each pole erected or set up and a license or tax on all conduits constructed to an amount equal to four poles to each block. And said company shall comply with all ordinances hereafter passed in regard to the license or tax on poles, conduits, or wires, either decreasing or increasing the same, that are general and applicable to all telegraph or telephone companies in said city." Other provisions made the location and maintenance of wires, poles, and conduits subject to the approval of the city officials; required the poles to be kept painted, and the wires, poles, conduits, and manholes to be maintained in a first-class condition and so as not to endanger life or limb; permitted the city to use the upper cross-arm of the poles for its fire alarm and police telegraph or telephone wires; and required written acceptance by the company before the ordinance should take effect. The company duly filed its written acceptance, and thereafter constructed its line, placing 66 poles upon city streets, 104 poles upon the right of way of the railway within the limits of the city as they existed at the acceptance of the ordinance, and 35 poles upon an adjacent portion of the right of way which at the acceptance of the ordinance was without the city limits but was brought within them a few days thereafter.

In the year 1917 the city sued the company in a state court, setting up the above-mentioned ordinance, averring that it was duly accepted by the company and was a contract between the parties, and alleging that pursuant to it the defendant had erected and maintained in the

city 205 poles upon which there were due the license taxes or fees at fifty cents per pole for four and a half years, amounting to $461.25. The company by its answer admitted the passage and acceptance of the ordinance but denied that it was a contract; alleged that the provision as to license fees did not include the poles placed upon the right of way of the railway company, especially not those that were without the limits of the city at the time of the acceptance of the ordinance; that fifty cents per pole per year was unreasonable and excessive and sought to be imposed not for inspection and regulation of the poles but for revenue purposes only; that said license fee or tax deprived defendant of its property without due process of law and denied to it the equal protection of the laws in violation of the Fourteenth Amendment; that defendant had accepted the restrictions and obligations of the Act of Congress approved July 24, 1866 (c. 230, 14 Stat. 221; Rev. Stats., § 5263, *et seq.*); that its poles and wires were in use for the transmission of messages for the United States and the various departments of the Government; and further that defendant was engaged principally in the transmission of telegraphic messages between points in Arkansas and points in other States and in foreign countries, and that the imposition of a fee or tax upon its poles was a burden upon and illegal interference with interstate and foreign commerce and the regulatory power of Congress over the same.

At the trial the company offered to pay the license tax upon the 66 poles that were placed upon the city streets, but disputed liability for those placed upon the railroad right of way. It proved acceptance of the Act of Congress of 1866, showed that the corporate limits had been extended after acceptance of the ordinance in such manner as to include 35 additional poles along the right of way, showed that the line on the right of way ran through a thinly populated part of the city as compared with the

streets covered by the franchise, being crossed, however, by two important streets and by two turnpikes that lead into the city, and offered to prove that two other telegraph companies maintaining poles and wires in the city were required to pay the tax only upon poles maintained upon the streets and not upon those maintained on railroad rights of way. General ordinances of the city were introduced in evidence, one of them antedating the franchise ordinance and providing as follows: "Each telegraph, telephone, electric light or power company shall pay annually a sum equal to fifty cents for each pole used by them whether such poles are leased, rented, or owned by them."

The trial court overruled the contentions of defendant and rendered a judgment against it for the entire amount claimed. This was affirmed by the Supreme Court of the State (131 Arkansas, 306), and the case is brought here upon the contention that the taxing provision of the franchise ordinance, as construed and applied, has the effect of depriving the defendant of rights secured to it by the Constitution and laws of the United States.

We are unable to see ground for dismissal of the writ of error, and will pass at once to the merits.

Notwithstanding that some of the provisions of the ordinance are contractual in form and by its own terms it was to take effect only after written acceptance by the company and such acceptance was in fact formally given, the Supreme Court of the State, as we read its opinion, dealt with the pole fees not as an agreed compensation for the franchise but as a license tax. Consequently we will—indeed must, for present purposes—so regard it.

Plaintiff in error contends that the court erred in construing the ordinance as imposing the tax with respect to the poles standing upon the railroad right of way, and especially as to the 35 poles which at the time of acceptance of the ordinance were without the limits of the city.

But as no question is raised here under the contract clause of the Constitution we are not at liberty to revise the decision of the state court upon the question of construction, and can only determine whether as construed and applied the ordinance deprives plaintiff in error of rights secured by other provisions of the Constitution and laws of the United States.

That a reasonable tax upon the maintenance of poles and wires erected and maintained by a telegraph company within the limits of a city pursuant to authority granted by its ordinances is not an unwarranted burden upon interstate or foreign commerce or upon the functions of the company as an agency of the government, and does not infringe rights conferred by the act of Congress, is so thoroughly settled by previous decisions of this court that no further discussion is called for. *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92, 100; *Western Union Telegraph Co.* v. *New Hope*, 187 U. S. 419, 425; *Atlantic & Pacific Telegraph Co.* v. *Philadelphia*, 190 U. S. 160, 164; *Western Union Telegraph Co.* v. *Richmond*, 224 U. S. 160; *Postal Telegraph-Cable Co.* v. *Richmond*, 249 U. S. 252.

These cases establish that a city (supposing, of course, it acts under the authority of the State) may impose such taxes not merely with respect to the special and exclusive occupancy of streets and other public places by poles and other equipment, but by way of compensation for the special cost of supervising and regulating the poles, wires and other fixtures and of issuing the necessary permits. Hence, in the present case, we cannot hold that the fact that a tax is imposed upon the poles that stand upon the railway right of way, as well as on those that stand upon the streets, is sufficient to condemn the ordinance, especially in view of the finding of the Supreme Court of Arkansas that the telegraph line as laid along the right of way crosses a street car line and several turnpikes coming into the city, and that it is necessary there shall be local

governmental supervision of the lines crossing these highways for the protection of travelers upon them.

There is no support in the record for the contention that a tax of fifty cents per pole per year is unreasonable in amount, even though it be made to apply to poles standing on private property or upon a railroad right of way as well as to poles erected in the streets.

Nor is there ground for holding that plaintiff in error is subjected to unreasonable discrimination, in contravention of the equal protection clause of the Fourteenth Amendment. The case shows that its franchise ordinance imposes the same and no greater tax than that which is applied by a general ordinance to other companies maintaining poles in the city. The offer of testimony to prove that the two other companies were not in fact required to pay the tax upon so many of their poles as stood upon railroad rights of way went no further than to show that the general ordinance had not been enforced against them in the same manner that it was proposed to enforce the franchise ordinance against plaintiff in error. There was no offer to show an arbitrary and intentionally unfair discrimination in the administration of the ordinance as in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 374. Peradventure the present action was a test case to determine whether the license fees were applicable to poles standing elsewhere than on the streets, with the intent, in case of an affirmative answer, to enforce the general ordinance against the other companies in the same sense. Nor was there any offer to show that the circumstances of the several companies and their telegraph lines were so much alike as to render any discrimination in the application of the pole tax equivalent to a denial of the equal protection of the laws.

None of the contentions of plaintiff in error being well founded, the judgment is

Affirmed.

PHILADELPHIA, BALTIMORE & WASHINGTON RAILROAD COMPANY *v.* SMITH.

CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

No. 472. Argued April 15, 1919.—Decided May 19, 1919.

An employee of an interstate railroad whose duties were to cook the meals, make the beds, etc., for a gang of bridge carpenters, in a camp car which was provided and moved from place to place along the railroad line to facilitate their work in repairing the bridges, and who, at the time of his injury, was within the car, on a side-track, and occupied in cooking a meal for the carpenters and himself while they were repairing one of the bridges in the vicinity, *held*, engaged in interstate commerce, within the meaning of the Federal Employers' Liability Act.

132 Maryland, 345, affirmed.

THE case is stated in the opinion.

Mr. Frederic D. McKenney, with whom *Mr. John Spalding Flannery* was on the briefs, for petitioner.

Mr. T. Alan Goldsborough for respondent.

MR. JUSTICE PITNEY delivered the opinion of the court.

Respondent brought his action in a state court of Maryland under the provisions of the Federal Employers' Liability Act of April 22, 1908, as amended April 5, 1910 (c. 149, 35 Stat. 65; c. 143, 36 Stat. 291), to recover damages for personal injuries sustained by him upon one of petitioner's lines of railroad in the State of Maryland over which petitioner was engaged in transporting interstate as well as intrastate commerce.

Plaintiff was employed by defendant in connection with a gang of bridge carpenters, who were employed by defendant in the repair of the bridges and bridge abutments upon said line of railway. The gang, including plaintiff, worked over the entire line, and were moved from point to point as the repair work required in what was called a "camp car," furnished and moved by defendant, in which they ate, slept, and lived. Plaintiff's principal duties were to take care of this car, keep it clean, attend to the beds, and prepare and cook the meals for himself and the other members of the gang. On December 23, 1915, the bridge carpenters were engaged in repairing a bridge abutment on defendant's line near Easton, Maryland, and the camp car was on defendant's side-track at Easton; and while plaintiff was in the car, engaged in cooking a meal for the bridge carpenters and himself, the engineer of one of defendant's trains, without warning, ran the engine upon the side-track and against a car to which the camp car was coupled with such force that plaintiff received injuries, to recover for which his action is brought.

A judgment in plaintiff's favor was affirmed by the Maryland Court of Appeals (132 Maryland, 345), and the case comes here on a writ of certiorari.

The only question we have to consider is whether plaintiff at the time he was injured was engaged in interstate commerce within the meaning of the statute. Petitioner, citing *Illinois Central R. R. Co.* v. *Behrens*, 233 U. S. 473, 478, and *Erie R. R. Co.* v. *Welsh*, 242 U. S. 303, 306, as conclusive to the effect that the true test is the nature of the work being done by the employee at the time of the injury, and that what he had been doing before and expected to do afterwards is of no consequence, argues that since plaintiff at the time of the injury and for some weeks prior thereto was and had been working as mess cook and camp cleaner or attendant for a gang of bridge carpenters who were quartered "for their own convenience"

in a camp car belonging to petitioner, which was not being moved in interstate commerce, but was located and standing on a switch track in the neighborhood of the bridge upon which the carpenters then were and for some weeks prior thereto had been and for some time afterwards were working; and since plaintiff at the moment of the injury was engaged in cooking food which was the property of himself and the carpenters, he was not at the time engaged in interstate commerce.

As thus stated, the relation of plaintiff's work to the interstate commerce of his employer would seem to be rather remote. But upon a closer examination of the facts the contrary will appear. Taking it to be settled by the decision of this court in *Pedersen* v. *Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146, 152, that the repair of bridges in use as instrumentalities of interstate commerce is so closely related to such commerce as to be in practice and in legal contemplation a part of it, it of course is evident that the work of the bridge carpenters in the present case was so closely related to defendant's interstate commerce as to be in effect a part of it. The next question is, what was plaintiff's relation to the work of the bridge carpenters? It may be freely conceded that if he had been acting as cook and camp cleaner or attendant merely for the personal convenience of the bridge carpenters, and without regard to the conduct of their work, he could not properly have been deemed to be in any sense a participant in their work. But the fact was otherwise. He was employed in a camp car which belonged to the railroad company, and was moved about from place to place along its line according to the exigencies of the work of the bridge carpenters, no doubt with the object and certainly with the necessary effect of forwarding their work, by permitting them to conduct it conveniently at points remote from their homes and remote from towns where proper board and lodging were to be had.

The circumstance that the risks of personal injury to which plaintiff was subjected were similar to those that attended the work of train employees generally and of the bridge workers themselves when off duty, while not without significance, is of little moment. The significant thing, in our opinion, is that he was employed by defendant to assist, and actually was assisting, the work of the bridge carpenters by keeping their bed and board close to their place of work, thus rendering it easier for defendant to maintain a proper organization of the bridge gang and forwarding their work by reducing the time lost in going to and from their meals and their lodging place. If, instead, he had brought their meals to them daily at the bridge upon which they happened to be working, it hardly would be questioned that his work in so doing was a part of theirs. What he was in fact doing was the same in kind, and did not differ materially in degree. Hence he was employed, as they were, in interstate commerce, within the meaning of the Employers' Liability Act.

Judgment affirmed.

UNITED STATES *v.* REYNOLDS.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 591. Argued March 4, 5, 1919.—Decided May 19, 1919.

Under the Allotment Act of February 8, 1887, § 5, c. 119, 24 Stat. 388, the twenty-five year trust period, with the attendant restriction upon the right of alienation, runs from the date of the trust patent, and not from the date of the approval of the allotment by the Secretary of the Interior; and an attempt to convey, made by an heir of the allottee, within that period as extended by the President before its expiration, is void. P. 107.

252 Fed. Rep. 65, reversed.

104. Argument for Respondent.

THE case is stated in the opinion.

The Solicitor General for the United States.

Mr. Mark Goode, with whom *Mr. Hal Johnson* and *Mr. Jesse D. Lydick* were on the brief, for respondent, argued, in part, as follows:

It is true that the provisional or trust patent did not actually issue until February 6, 1892, or perhaps more correctly speaking it was dated as of that date, but it is likewise true that Stella Washington's right to a preliminary patent vested on the instant her allotment was approved. Her equitable title was then complete and did not depend upon the delivery of the trust patent. *Ballinger* v. *Frost*, 216 U. S. 240.

By the very terms of the approval the patent was ordered issued positively and unequivocally. No reservation was made and no discretion was vested in any one after that, and the duty to issue thereupon became purely ministerial. Delay in issuing, or failure to issue such patent thereafter could not postpone or defeat the vesting of the equitable interest, nor could it postpone the beginning of the trust period. Not only did the approval of the Secretary contain an absolute order for the issue; but the act itself is mandatory. It reads: "That upon the approval of the allotments provided for in this act by the Secretary of the Interior, *he shall cause* patents to issue therefor in the name of the allottees," etc. No discretion is lodged anywhere with regard to issuance of the trust patents.

It therefore follows that the trust began to run with the approval. However, it makes no difference whether we say the trust was created by the patent, for it would relate back to the approval; but we hardly think it can be said that the trust is created by the patent for it might well be that the issue of a patent in a given case could be

overlooked for years, and this has actually occurred, and could it then be said that no trust was created because someone forgot to write out and record the patent?

Stella Washington obtained a vested interest in the land when her allotment was approved on September 16, 1891, and by operation of law the right to convey passed to her heirs on September 16, 1916. *Ballinger* v. *Frost*, 216 U. S. 240; *Simmons* v. *Wagner*, 101 U. S. 260; *Wood* v. *Gleason*, 43 Oklahoma, 9; *Godfrey* v. *Iowa Land & Trust Co.*, 21 Oklahoma, 293.

MR. JUSTICE PITNEY delivered the opinion of the court.

This was a suit brought by the United States in behalf of Claudius Tyner and ten other persons, heirs at law of Stella Washington, deceased, who was a member of the Absentee Shawnee Tribe of Indians of Oklahoma; its object being to cancel a deed made by Tyner to Suda Reynolds on February 17, 1917, purporting to convey an undivided eleventh interest in a tract of land inherited by the eleven heirs from Stella Washington, who was the allottee thereof. The legal title to the tract was held by the United States under a certificate of allotment or "trust patent," dated February 6, 1892, containing a provision that the United States did and would hold the land in question in trust for the said Stella and in case of her death for her heirs, for a period of twenty-five years, at the expiration of which time the United States would convey the same by patent in fee, discharged of the trust, to said Indian or her heirs, unless the trust period had been extended by the President of the United States.

The allotment was made under the provisions of the Act of Congress approved February 8, 1887, c. 119, 24 Stat. 388, as amended by Act of March 3, 1891, c. 543,

26 Stat. 989, 1019. Section 5 of the Act of 1887 provided: "That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void."

Stella Washington's allotment was approved by the Secretary September 16, 1891; the allotment certificate or trust patent was issued on February 6, 1892. On November 24, 1916, the President by executive order extended the trust period for ten years. Thereafter, on February 17, 1917, Tyner executed the deed in question to Suda Reynolds.

The first question presented by the record is whether the original trust period extended for twenty-five years from February 6, 1892, the date of the trust patent, or from September 16, 1891, the date of the approval of the allotment. If the former, there is no question that the executive order, being made within the original trust period, was valid (subject to an objection as to its form), and had the effect of extending the trust, with resulting

restriction upon the right of alienation, for the further period of ten years. If, on the other hand, the original trust period should be dated from the approval of the allotment, it still is insisted by the Government that the right of the President to extend the trust period continued beyond the twenty-five years and until the United States surrendered its trust by conveying the absolute fee simple title to the Indian allottee or his heirs.

The District Court sustained the contention of the United States and entered a decree canceling Tyner's deed as void and constituting a cloud upon its title. The Circuit Court of Appeals reversed this decree and directed a dismissal of the bill. 252 Fed. Rep. 65.

The latter decision rests upon the ground that under § 5 of the allotment act the right of the allottee to a preliminary or trust patent became absolute upon the approval of the allotment by the Secretary of the Interior; that her equitable title was then complete, and did not depend upon the delivery of the patent. *Ballinger* v. *Frost*, 216 U. S. 240, was cited in support of this; but it is not entirely apposite. That case turned upon the effect of a certificate of allotment issued under the Choctaw and Chickasaw Agreement (Act of July 1, 1902, c. 1362, 32 Stat. 641, 644), the 23d section of which declared that such certificate should be "conclusive evidence of the right of any allottee to the tract of land described therein." The Indian, being a citizen and resident of the Choctaw Nation duly enrolled and entitled to an allottment, selected as such the land in controversy, upon which were her buildings and improvements; this was received by the Commission to the Five Civilized Tribes, and, after the expiration of nine months, the time prescribed by statute for contest, no contest of her right to the designated allotment having been made, a certificate was issued and delivered to her. This court held the allottee's rights had become fixed, the Secretary of the In-

terior thereafter having nothing but the ministerial duty to perform of seeing that a patent was duly executed and delivered, and upon this ground sustained a judgment awarding a writ of mandamus; citing *Barney* v. *Dolph*, 97 U. S. 652, 656; *Simmons* v. *Wagner*, 101 U. S. 260, 261; *Cornelius* v. *Kessel*, 128 U. S. 456, 461; *Orchard* v. *Alexander*, 157 U. S. 372, 383; and other cases.

The rule established by these cases is familiar. But we do not think it can be applied so as to give finality to the act of the Secretary in approving the allotment under § 5 of the Act of 1887. Nor does that act contain any such declaration of conclusive effect as is found in § 23 of the Choctaw-Chickasaw Agreement. While the matter is not free from doubt, we have reached the conclusion that by the better construction the trust period begins and dates from the issuance of the trust patent and not from the approval of the allotment. The Department distinctly so ruled in *Klamath Allotments*, 38 L. D. 559, 561, where it was said, after quoting the pertinent language of § 5 of the Act of 1887: "Clearly no trust is declared until actual issuance of patent, and the use of a word of the present tense, 'does,' shows that the trust period begins to run only upon such issuance." This ruling was made in the year 1910, and may be inconsistent with some previous rulings of the Department, as counsel for respondent insists that it is. Nevertheless it is entitled to weight as an administrative interpretation of the act; it comports with our impression of the natural meaning of the language employed by Congress; and it very probably was relied upon by the President when promulgating the order of November 24, 1916, extending the trust period. This order might as well have been made a few months earlier, had it been supposed that the 25-year period was to expire in September.

This construction of the Act of 1887 puts it in agree-

ment with other acts for the allotment of Indian lands,[1] which, while subsequently passed and perhaps not strictly to be regarded as a legislative interpretation, nevertheless seem to us to indicate the effect that Congress attributed to the Act of 1887.

Some criticism is made by counsel for respondent upon the form of the executive order of November 24, 1916, as being indefinite and not in accordance with the act of Congress. We deem this criticism unfounded, and need spend no time upon it.

Calculating the 25-year period from February 6, 1892, the date of trust patent for the Stella Washington allotment, it expired on February 5, 1917; but the trust was extended for a further term of ten years, and hence the deed made by Claudius Tyner to Suda Reynolds February

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[1] Act of March 2, 1889, c. 422, 25 Stat. 1013, 1014, providing for allotments to Peorias and Miamis, contains this provision: "The land so allotted shall not be subject to alienation for twenty-five years from the date of the issuance of patent therefor."

Act of March 2, 1895, c. 188, 28 Stat. 876, 907, (the Quapaw Act) contains this: "*Provided*, That said allotments shall be inalienable for a period of twenty-five years from and after the date of said patents."

Act of July 1, 1902, c. 1362, 32 Stat. 641, 642, (Choctaw-Chickasaw Act) contains the following:

(Sec. 12, relating to homesteads.) "Shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment."

(Sec. 13.) "The allotment of each Choctaw and Chickasaw freedman shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment."

(Sec. 16.) "All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent."

Cherokee Allotment Act of July 1, 1902, c. 1375, 32 Stat. 716, contains similar language in §§ 13 and 15.

17, 1917, was null and void by the terms of § 5 of the Act of 1887.

As the President's order was made within the original 25-year period, it is unnecessary to consider whether he might have acted with like effect at a later time.

The decree of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

UNITED STATES FIDELITY & GUARANTY COMPANY v. STATE OF OKLAHOMA ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 304. Argued April 17, 1919.—Decided May 19, 1919.

The court has no jurisdiction on error, under Jud. Code, § 237, as amended, on the ground that a state law was sustained against a claim that it impaired the obligation of a prior contract, where the state court appears to have rested its judgment, reasonably, on earlier laws and decisions, without any application of the law in question.

Writ of error to review 168 Pac. Rep. 234, dismissed.

THE case is stated in the opinion.

Mr. C. B. Ames for plaintiff in error.

Mr. H. L. Stuart, with whom *Mr. S. P. Freeling*, Attorney General of the State of Oklahoma, and *Mr. W. A. Ledbetter* were on the brief, for defendants in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

May 18, 1909, plaintiff in error became surety upon a bond to secure repayment of funds to be deposited by

Commissioners of the Land Office of Oklahoma with the Columbia Bank & Trust Co. After receiving more than $50,000 the Trust Company became insolvent, and in September, 1909, refused to honor a proper demand therefor. The State sued the surety in one of its own courts, December 24, 1909, and judgment there for full amount of the bond was affirmed by the Supreme Court, October 9, 1917. 168 Pac. Rep. 234.

The cause is here on writ of error and jurisdiction of this court is challenged upon the ground that the suit is not one "where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity." Judicial Code, § 237, as amended by Act approved September 6, 1916. We think the point well taken and the writ must be dismissed.

In support of our jurisdiction it is said: "The case is properly here by writ of error because it involves the validity of legislation of the State of Oklahoma alleged by the plaintiff in error to impair the obligation of its contract." But we have often held that mere assertion of a claim in respect of some constitutional right is not sufficient; there must be a real and substantial controversy of the required character which deserves serious consideration. *Ennis Water Works* v. *City of Ennis*, 233 U. S. 652, 658.

Counsel for plaintiff in error further say: "Our position is that under this bond and the statutes in force at the time it was executed a contract was created between the State, the Columbia Bank & Trust Company, and the United States Fidelity & Guaranty Company, pursuant to which the Guaranty Company was liable to the State

for such loss as it might sustain by reason of the failure of the Trust Company; that the Guaranty Company was entitled to exoneration from the Trust Company and to contribution from the guaranty fund; and that this contract was impaired by the Act of March 6, 1913." (§ 9, c. 22, Session Laws, 1913.) It provides, "No deposit in a state bank, otherwise secured, shall be protected by, or paid out of, the Depositors' Guaranty Fund created under the laws of the State of Oklahoma, nor included in the computation of average daily deposits as a basis for assessments. No deposit in any state bank, on which a greater rate of interest is allowed or paid, either directly or indirectly, than is permitted by the rules of the Bank Commissioner, shall participate in the benefits of the Guaranty Fund."

The opinion of the Supreme Court makes no reference to the Act of March 6, 1913, and we can discover no plausible basis for the argument that, notwithstanding such omission, force and effect were really given thereto—that it must have been the basis of the decision. The court approved, and undertook to support its conclusion by former opinions, commencing with *Columbia Bank & Trust Co.* v. *United States Fidelity & Guaranty Co.*, 33 Oklahoma, 535, decided in 1912, which, it declared, show a consistent view contrary to the position maintained by plaintiff in error. And an examination of these opinions leaves no doubt that they are relevant and tend to uphold the doctrine applied in the present cause. We find nothing to indicate a purpose to give effect to the specified act.

Dismissed.

BERKMAN ET AL. *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 865. Argued April 16, 1919.—Decided May 19, 1919.

A defendant under indictment who, pursuant to an order obtained on his own application, voluntarily deposits cash in the registry in lieu of bail, does so with full knowledge that under Rev. Stats., § 828, if applicable to such cases, one per cent. may be taxed as compensation to the clerk for receiving, keeping and paying out the money; and the contentions that the retention of such percentage, upon return of the deposit after his conviction, brings that section in conflict with the Fifth and Eighth Amendments, and Art. IV, § 2, of the Constitution, are frivolous, and will not support a direct writ of error under Jud. Code, § 238. P. 117.

Writ of error dismissed.

THE case is stated in the opinion.

Mr. Harry Weinberger for plaintiffs in error.

This practice of taking one per cent. deprives the bailor of plaintiffs in error of his property without due process of law, and takes his property without compensation. If we have the absolute right to give bail, defendants having been surrendered to answer the judgment of the court, the letter of the bond has been satisfied and the bailor has the absolute right to the return of his security, and any taking of part or all of the same by the court on any pretext (defendants having been surrendered to the court) is directly in violation of the Fifth Amendment.

It violates Art. IV, § 2, cl. 1, of the Constitution.

This right of giving cash bail comes from the common law. Petersdorff, Law of Bail, p. 7.

There can be no question that any impediment to the giving of bail works a hardship on defendants who may be

brought into court to face a criminal charge. The construction of the court puts additional burdens on certain classes. Nothing is charged by the Government for investigating the sufficiency of the real estate or the reliability of the bonding company, so if the trouble of the clerk is considered, it is less in cash bail cases, and no reason for the distinction or discrimination exists.

It violates the Eighth Amendment. "Excessive bail shall not be required."

Any impediment to the giving of bail is exactly the same as requiring excessive bail. It works to prevent a defendant being released on bail. If Congress could tax one per cent. on cash bail, it could tax it ninety per cent., or one hundred per cent., or tax similarly other kinds of bail, and so prevent it, thus circumventing the prohibition of this section. It was the intention of the Constitution to absolutely make sacred the right to bail, without any impediment and not too large bail.

Mr. Assistant Attorney General Porter, with whom *Mr. W. C. Herron* was on the brief, for the United States:

The plaintiffs in error are not entitled to come directly from the District Court to this court on the question of the construction of the statutes of the United States, or the decisions of the courts thereon, by a mere claim that the Constitution is involved. Judicial Code, § 238; *Rakes* v. *United States*, 212 U. S. 55, 58; *Lamar* v. *United States*, 240 U. S. 60, 65. They must, therefore, assume a construction of the statutes against them, and their claim must be that Congress has no power to enact that a defendant shall pay poundage to the clerk on money voluntarily deposited by him in lieu of bail. Such a claim is frivolous, the provisions of the Constitution referred to by plaintiffs in error having no application. It is not taking property without due process of law to compel a party to a cause to pay for services rendered at his voluntary request and

for his benefit. Costs may constitutionally be taxed. *Farmers' Insurance Co.* v. *Dobney*, 189 U. S. 301, 304; *Missouri, Kansas & Texas Ry. Co.* v. *Cade*, 233 U. S. 642, 651, 652; *Meeker* v. *Lehigh Valley R. R. Co.*, 236 U. S. 412, 432.

Nor is Article IV, § 1, or the Fourteenth Amendment, of the Constitution, any more applicable. Each applies only to state action. *United States* v. *Harris*, 106 U. S. 629, 643.

If it be assumed that the United States is prohibited by implication from discrimination between persons (see *United States* v. *Heinze*, 218 U. S. 532, 546), there is nothing arbitrary or grossly unfair in distinguishing between those defendants who give recognizance with surety and those who give cash bail, requiring the latter to pay a fee for the safe-keeping of the money. It is in no sense a discrimination. The service of holding the deposit is not performed for those who give a bond with surety. In the absence of statute, money can not be taken in lieu of bail, *United States* v. *Faw*, 1 Cranch, C. C. 486; *State* v. *Owens*, 112 Iowa, 403, 407, and cases cited. The statute which grants this privilege may constitutionally require that the person exercising it shall be subject to the burdens necessarily involved.

The points as to unreasonable search and seizure and excessive bail, if the plaintiffs in error are in any position to raise them on this application, need only be stated to demonstrate their lack of substance.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Section 828, U. S. Revised Statutes, which specifies the compensation to be taxed and allowed to clerks of District Courts, among other things provides: "For receiving, keeping, and paying out money, in pursuance

of any statute or order of court, one per centum on the amount so received, kept, and paid."

In each of the criminal causes entitled *The United States* v. *Emma Goldman* and *The United States* v. *Alexander Berkman*, some days subsequent to defendants' arrest (June, 1917), evidently upon applications in their behalf consented to by the District Attorney, the court below directed "That the sum of $25,000 Dollars, cash, be deposited in the Registry of this Court in lieu and place of bail for the appearance of the above-named defendant before the United States District Court for the Southern District of New York, in accordance with the provisions of the recognizance to be given by said defendant." Defendants were afterwards convicted and sentenced to imprisonment.

Upon motions duly presented the clerk was afterwards directed to pay to defendants' counsel funds deposited under the above orders, less costs. He retained one per centum as compensation and the court refused to declare this sum unlawfully withheld and direct its return. The matter is here by writ of error to the District Court.

It is now maintained that § 828 does not apply to criminal cases. Further, that if construed to be applicable where cash is deposited in lieu of bail for appearance of one charged with crime, it conflicts with the Federal Constitution, Fifth Amendment—"No person shall . . . be deprived of . . . liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation"; also with Article IV, § 2—"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States;" and with the Eighth Amendment—"Excessive bail shall not be required."

Our jurisdiction depends upon whether the case really and substantially involves the constitutionality of the section in question as construed and applied. Judicial

Code, § 238; *Rakes* v. *United States*, 212 U. S. 55, 58; *Lamar* v. *United States*, 240 U. S. 60, 65. And we deem it too clear for serious discussion that, as enforced below, the statute deprived plaintiffs in error of no right guaranteed by any of the constitutional provisions relied upon. With full knowledge they voluntarily asked to deposit money with the clerk and later requested that he be required to pay it out. Having thus obtained his services they now deny his claim for compensation. Obviously, nothing was taken from them without due process of law; their property was not taken for public use; they were not deprived of any privilege or immunity enjoyed by citizens of other States; and the record reveals no relation between the contested charge and any excessive bail. We think the suggested constitutional questions are wholly wanting in merit and too insubstantial to support our jurisdiction. *Brolan* v. *United States*, 236 U. S. 216, 218. The writ of error must be

Dismissed.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS dissent.

CAREY *v.* STATE OF SOUTH DAKOTA.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

No. 346. Submitted April 29, 1919.—Decided May 19, 1919.

Section 29, Laws of South Dakota, 1909, c. 240, which forbids shipment by carrier of wild ducks and is applicable whether the birds were taken lawfully or unlawfully, or shipped in open or closed season, is not inconsistent with the Federal Migratory Bird Act of March 4, 1913, c. 145, 37 Stat. 828, 847, and the regulations of the Department of Agriculture adopted thereunder, since the latter act pro-

hibits only the destruction or taking of birds contrary to the regulations and the regulations merely prescribe the closed seasons, and neither the act nor the regulations deals with shipping. P. 120.

Whether other provisions of this state law may be in conflict with the federal act is not considered, since the provisions in question may stand alone. *Id.*

The declaration of the federal act that the migratory birds "shall hereafter be deemed to be within the custody and protection of the Government of the United States," is limited by the context to the prohibition above stated. P. 121.

39 S. Dak. 524, affirmed.

THE case is stated in the opinion.

Mr. Joe Kirby for plaintiff in error. *Mr. Joe H. Kirby* and *Mr. Thos. H. Kirby* were on the brief.

Mr. Clarence C. Caldwell, Attorney General of the State of South Dakota, *Mr. Edwin R. Winans* and *Mr. Byron S. Payne*, Assistant Attorneys General of the State of South Dakota, for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

By the Federal Migratory Bird Act (March 4, 1913, c. 145, 37 Stat. 828, 847) Congress provided that: "All wild geese, wild swans, brant, wild ducks, snipe, plover, woodcock, rail, wild pigeons, and all other migratory game and insectivorous birds which in their northern and southern migrations pass through or do not remain permanently the entire year within the borders of any State or Territory, shall hereafter be deemed to be within the custody and protection of the Government of the United States, and shall not be destroyed or taken contrary to regulations hereinafter provided therefor." These regulations relate to the fixing of "closed seasons, having due regard to the zones of temperature, breeding habits, and times and line of migratory flight." The act further declared that "noth-

ing herein contained shall be deemed to affect or interfere with the local laws of the States and Territories for the protection of nonmigratory game or other birds resident and breeding within their borders, nor to prevent the States and Territories from enacting laws and regulations to promote and render efficient the regulations of the Department of Agriculture provided under this statute." Regulations were proclaimed October 1, 1913, 38 Stat. 1960; and were amended by the Proclamation of August 31, 1914, 38 Stat. 2024, and the Proclamation of October 1, 1914, 38 Stat. 2032.

Before the passage of the federal law the legislature of South Dakota had provided (Laws 1909, c. 240, § 29) that "No person shall . . . ship, convey or cause to be shipped or transported by common or private carrier, to any person, either within or without the state . . . wild duck of any variety. . . ." For violation of this statute by shipping on November 19, 1915, by express, wild ducks from a point within the State to Chicago, Illinois, Carey was prosecuted in a state court. He insisted that the state statute had been abrogated by the federal law. The contention was overruled and he was convicted by the trial court. Its judgment was affirmed by the Supreme Court of the State (39 S. Dak. 524). The case comes here on writ of error under § 237 of the Judicial Code.

It is admitted that, in the absence of federal legislation on the subject, a State has exclusive power to control wild game within its borders and that the South Dakota law was valid when enacted, although it incidentally affected interstate commerce. *Geer* v. *Connecticut*, 161 U. S. 519; *Silz* v. *Hesterberg*, 211 U. S. 31. The contention made by Carey is that Congress assumed exclusive jurisdiction over this class of migratory birds by the 1913 Act; that then existing state laws on the subject were thereby abrogated or suspended; that the power of the States to legislate on the subject was limited to such subsequent

enactments as were designed to render more effective regulations issued by the Department of Agriculture, and that the statute in question was obviously not of that character, both because it antedated the federal act and because the regulations issued under the federal act permitted the killing of wild ducks in South Dakota between September 7 and December 1, during which period the wild ducks shipped on November 19 had presumably been killed. On behalf of the State, it was contended that this provision of its statute is not inconsistent with the federal law; and that its statute is in any event valid, because the federal law is unconstitutional. *United States* v. *McCullagh*, 221 Fed. Rep. 288. The Supreme Court of South Dakota did not pass upon the constitutional question; but upheld the state statute on the ground that it was not inconsistent with the federal law, since it did not appear that the ducks in question had been killed in violation of any regulation adopted under it.

The prohibition of the federal act is limited to the provision that the birds "shall not be destroyed or taken contrary to regulations." The regulations merely prescribe the closed seasons. That is, neither the federal law nor the regulations deal with shipping.[1] The prohibition of the state law here in question is limited to forbidding persons to "ship . . . by common or private carrier." It applies alike whether the shipment is made in open or closed season; and it applies although the birds were lawfully killed or taken. This provision of the state law is obviously not inconsistent with the federal law. The fact that other provisions of this state statute may be so (which we do not consider) is immaterial, as the provision here in question may clearly stand alone. *Brazee* v. *Michigan*, 241 U. S. 340, 344; *Guinn* v. *United States*, 238 U. S. 347, 366; *Louisville & Nashville R. R. Co.* v.

[1] The Migratory Bird Treaty Act (July 3, 1918, c. 128, 40 Stat. 755) deals in § 4 with shipments in interstate commerce.

Garrett, 231 U. S. 298, 311; *Presser* v. *Illinois*, 116 U. S. 252, 263.

It is, however, urged that Congress has manifested its intention to assume exclusive jurisdiction of the subject; and that the failure to make any provision in the federal act concerning shipping, evidences the purpose of Congress that the shipping of game birds shall not be prohibited. This argument rests upon the clause which declares that the migratory birds "shall hereafter be deemed to be within the custody and protection of the Government of the United States." But that clause may not be read without its context; and the words immediately following show that the custody and protection is limited to prohibiting their being "destroyed or taken contrary to regulations" which are to fix the closed seasons in the several zones. If, reading the federal act as a whole, there were room for doubt, two established rules of construction would lead us to resolve the doubt in favor of sustaining the validity of the state law. *First:* The intent to supersede the exercise by a State of its police powers is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State. *Savage* v. *Jones*, 225 U. S. 501, 533; *Missouri, Kansas & Texas Ry. Co.* v. *Haber*, 169 U. S. 613, 623. *Second:* Where a statute is reasonably susceptible of two interpretations, by one of which it would be clearly constitutional and by the other of which its constitutionality would be doubtful, the former construction should be adopted. *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, 422; *Knights Templars' Indemnity Co.* v. *Jarman*, 187 U. S. 197, 205.

The Supreme Court of South Dakota did not err in its judgment upholding the constitutionality of the provision of the state statute under which the plaintiff in error was convicted; and its judgment is

Affirmed.

Counsel for Plaintiff in Error.

CHESAPEAKE & DELAWARE CANAL COMPANY *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 192. Argued April 17, 1919.—Decided May 19, 1919.

It is a perversion of the rule requiring assignments of error to multiply them unnecessarily. P. 124.

State statutes of limitations and the principle of laches are inapplicable to the United States when asserting governmental rights. P. 125.

Semble, that the presumption of payment arising from the lapse of twenty years without suit to collect does not apply to the United States in such cases. *Id.*

The collection of dividends declared on corporate shares owned by the United States is an assertion of its right as creditor unaffected by its relations as shareholder, and, in suing for such dividends, they being public moneys applicable only to public purposes, the United States acts in its governmental capacity. P. 126.

Books of the Treasury Department, showing the miscellaneous receipts and disbursements of the Government, printed from the written public records of the Department, pursuant to the acts of Congress and Art. I, § 9, cl. 7, of the Constitution, and used as original records in the daily business of the Department and produced from its custody, *held*, competent evidence, without certification under Rev. Stats., § 882, for the purpose of proving the nonpayment as well as the payment of dividends by a private corporation to the United States. P. 127.

Evidence *held* sufficient to show that dividends sued for by the Government many years after they were declared were never paid, and to sustain refusal of defendant's motion for a directed verdict. P. 129.

240 Fed. Rep. 903, affirmed.

THE case is stated in the opinion.

Mr. Charles J. Biddle, with whom *Mr. Charles Biddle*, *Mr. Andrew C. Gray*, *Mr. J. Rodman Paul* and *Mr. R. Mason Lisle* were on the brief, for plaintiff in error.

The Solicitor General, Mr. Assistant to the Attorney General Todd and *Mr. Lincoln R. Clark*, for the United States, submitted.

MR. JUSTICE CLARKE delivered the opinion of the court.

In 1912 the United States sued the Canal Company to recover the amount of three dividends which had been declared on shares of its capital stock owned by the Government, in the years 1873, 1875, and 1876, payment of which, it was averred, had been refused when demand was made therefor in the year 1911.

After various vicissitudes the case went to trial on issue joined on the plea of payment by the Company and it comes into this court on writ of error to the Circuit Court of Appeals for the Third Circuit.

There are forty-one assignments of error in this court, which counsel in their brief compress into five questions, and these resolve themselves, at once, into three, viz.: (1) The applicability of the statute of limitations of the State of Delaware; (2) The admissibility in evidence of certain books of the Department of the Treasury; and (3) The propriety of a requested instruction in favor of the Canal Company.

Such a record constrains us to repeat the following:

"This practice of unlimited assignments is a perversion of the rule, defeating all its purposes, bewildering the counsel of the other side, and leaving the court to gather from a brief, often as prolix as the assignments of error, which of the latter are really relied on." *Phillips & Colby Construction Co.* v. *Seymour*, 91 U. S. 646, 648; *Grayson* v. *Lynch*, 163 U. S. 468, and *Central Vermont Ry. Co.* v. *White*, 238 U. S. 507.

The plea of the statute of limitations was rejected by both lower courts, and, although the specific assignment of this ruling as error in the Circuit Court of Appeals is

not repeated in this court, it will be considered because possibly embraced within some of the general assignments.

Both lower courts ruled that the Government was not bound by the state statute of limitations and that the doctrine of laches was not applicable to it, but they agreed that a rebuttable presumption of payment arose after the lapse of more than twenty years from the date when the debt became due, without suit being instituted to collect it, and that, this appearing from the pleadings of the Government, the burden was upon it of overcoming the presumption by evidence that payment, as it averred, had not been made. The Company, without introducing any testimony, relied wholly upon this presumption of payment.

Although the burden of the responsibility of proving non-payment was accepted by the Government, the Canal Company, nevertheless, argues that the state statute of limitations is also applicable.

It is settled beyond controversy that the United States when asserting "sovereign" or governmental rights is not subject to either state statutes of limitations or to laches.

That the doctrine of laches is not applicable to the Government was announced by Mr. Justice Story on the Circuit in 1821 and afterward in 1824 authoritatively, upon principle, in *United States* v. *Kirkpatrick*, 9 Wheat. 720.

This rule has been often approved and was applied so lately as *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 409.

That the United States is not bound by state statutes of limitations is settled with equal definiteness in *United States* v. *Nashville, Chattanooga & St. Louis Ry. Co.*, 118 U. S. 120; *United States* v. *Whited & Wheless*, 246 U. S. 552, 561.

Whether this rule extends to and includes the presumption of payment arising from the lapse of twenty years

without suit to collect is not questioned by appropriate exceptions in the record before us, and it is, therefore, not decided. It is not intended, however, to approve the holding of the Circuit Court of Appeals on this subject. *United States* v. *Thompson*, 98 U. S. 486, 489, and cases hereinbefore cited.

The contention of the Canal Company that the Government by becoming a stockholder in a private corporation so abdicated its governmental character that, under the circumstances of this case, it was bound as a private person by statutes and rules of limitation, cannot be allowed.

If the Government were asserting any rights with respect to the conduct of the corporation's affairs, its contracts or its torts, then its rights, duties and privileges would be no greater than those of any other stockholder. *Bank of the United States* v. *Planters' Bank*, 9 Wheat. 904, 907. But here the Government is pursuing a right to recover, which is not affected by its relation to the corporation as a stockholder. The declaration of the dividends, which is admitted, gave it the status of a creditor of the company, and, thereafter, the right to recover was unaffected by any stockholder relation. To this must be added that the statutes and rules of limitation relate to the remedy to enforce the right, and not to the corporate relation from which the right springs, and that, since these dividends constituted "public money" applicable to public purposes only, the Government in collecting them was acting in its governmental capacity as much as if it were collecting taxes, such as those with which, no doubt, the stock which produced the dividends was purchased. The Circuit Court of Appeals answered this contention in a manner not to be improved upon, saying (223 Fed. Rep. 926, 928):

"We may perhaps add a few words to say that the fallacy of the company's argument seems to lurk in the assumption that in this action the government is asserting a right

in its character as a stockholder. Undoubtedly the right came into being because the government owns the stock, but in no other respect has the suit anything to do with such ownership. The government is not suing as a stockholder; it is suing as a creditor, and in this character alone is it now to be considered."

The questions remain as to the admissibility of the books and the sufficiency of the evidence to carry the case to the jury.

The Government produced a witness who testified that he, in conspiracy with another employee of the Canal Company, embezzled the amount of these dividends and that to conceal their crime they placed in the files of the Canal Company, from which they were produced in evidence, forged drafts purporting to have been drawn by Assistant Treasurers of the United States upon the Treasurer of the Canal Company for payment of these dividends and also what purported to be receipts therefor. This witness testified that until 1886, when he left the employ of the Canal Company, no notice of the declaration of the three dividends in controversy had been sent to the Government, as had been the practice when earlier dividends were declared; that until that time no payment of them had been made, and that the names signed to the drafts and receipts were fictitious.

The Government also produced the notices by the Canal Company of the declaration of each of the fourteen earlier dividends and the record of the payment of them.

To supplement this evidence the books were produced in evidence, the admission of which is assigned as error.

Employees of the Department of the Treasury, who produced the books, testified: that they were records of the Department compiled by authority of law under the direction of the Secretary of the Treasury and were the volumes in daily use by officials and employees in the discharge of their duties; that part of them were printed

from the original records of miscellaneous revenues, in which such dividends would be classed, while others were printed compilations from books not of original entry, and the testimony was that the volumes produced were intended to, and the witnesses believed did, show all of the miscellaneous receipts and disbursements of the Government from 1848 to 1914. They showed the receipt by the Government of fourteen dividends paid by the Canal Company prior to those in controversy and the witnesses testified that a careful search made by them failed to discover any record in the books of the receipt of any of the three dividends sued for. There was an elaborate description of the method employed by the Department of the Treasury in keeping its accounts and of the necessarily contemporaneous character of the original entries, which it is not necessary to rehearse. The copies produced were printed by the Public Printer.

The objection is that these are not books of original entry and that they are not certified as copies of public records are required to be by Rev. Stats., § 882.

It is enough to say of this last contention that although the books admitted were printed from written public records, they were so printed by authority of law and were produced from the custody of the Department of the Treasury, where they were used as original records in the transaction of the daily business of the Department and therefore they did not require certification.

They were public records, kept pursuant to constitutional and statutory requirement. Constitution of the United States, Article I, § 9, cl. 7; Act of Congress, approved September 2, 1789, c. 12, § 2, 1 Stat. 65; Rev. Stats., § 257; Act of Congress, approved September 30, 1890, c. 1126, 26 Stat. 504, 511; Act approved July 31, 1894, c. 174, § 15, 28 Stat. 162, 210. Thus, their character as public records required by law to be kept, the official character of their contents entered under the sanction of public duty,

the obvious necessity for regular contemporaneous entries in them and the reduction to a minimum of motive on the part of public officials and employees to either make false entries or to omit proper ones, all unite to make these books admissible as unusually trustworthy sources of evidence. *Gaines* v. *Relf*, 12 How. 472, 570; *Bryan* v. *Forsyth*, 19 How. 334, 338; *Post* v. *Supervisors*, 105 U. S. 667, 670; *Oakes* v. *United States*, 174 U. S. 778, 783, 796; *Holt* v. *United States*, 218 U. S. 245, 253. Obviously such books are not subject to the rules of restricted admissibility applicable to private account books. The considerations which we have found rendered the books admissible in evidence as tending to prove the truth of the statements of entries contained in them also make them admissible as evidence tending to show that because the receipt of the dividends was not entered in them they were not received and therefore were not paid. The evidence may not be as persuasive in the latter case as in the former, but that it was proper evidence to be submitted to the jury for the determination of its value we cannot doubt. Such books so kept presumptively contained a record of all payments made and the absence of any entry of payment, where it naturally would have been found if it had been made, was evidence of nonpayment proper for the consideration of the jury. *United States* v. *Teschmaker*, 22 How. 392, 405; *State* v. *McCormick*, 57 Kansas, 440; *Bastrop State Bank* v. *Levy*, 106 Louisiana, 586; Wigmore on Evidence, § 1531, § 1633, par. 6.

We agree with the Circuit Court of Appeals that the evidence introduced carries clear conviction that the dividends were never paid, and that the request of the Canal Company for an instructed verdict in its favor was properly denied. The judgment of the Circuit Court of Appeals is

Affirmed.

KINZELL *v.* CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO.

No. 485. Argued April 15, 1919.—Decided May 19, 1919.

In the progress of filling in earth to replace a railroad trestle used in interstate commerce, the earth as dumped attained a level higher than the rails on the trestle, and, to keep the track open for traffic, as well as to widen the embankment, the earth was spread away by scrapers adjusted to a car attached for the purpose to the dump train. *Held*, that an employee in charge of the car, and employed also in removing earth and stones from between the rails, was employed in interstate commerce within the meaning of the Employers' Liability Act.

31 Idaho, 365, reversed.

THE case is stated in the opinion.

Mr. James A. Wayne, with whom *Mr. John P. Gray* and *Mr. William D. Keeton* were on the brief, for petitioner.

Mr. George W. Korte, with whom *Mr. Heman H. Field* was on the brief, for respondent.

MR. JUSTICE CLARKE delivered the opinion of the court.

This case comes into this court on writ of certiorari to the Supreme Court of the State of Idaho and all of the facts essential to its decision are admitted or are not controverted, and are as follows:

When the accident complained of in the case occurred, the Railway Company, respondent, was engaged in filling with earth a wooden trestle-work bridge, 1200 feet in length, by which its track was carried across a dry gulch

or coulee, the purpose being to continue the track upon the solid embankment when it should be completed.

It was admitted that the Railway Company was engaged in interstate commerce, and that during the progress of the filling the bridge was used for interstate trains. Pursuant to an order of court, the petitioner, an employee of the respondent, elected to rely on the Federal Employers' Liability Act of April 22, 1908, for his right to recover.

Several weeks prior to the accident to the petitioner Kinzell, the work of filling the bridge had progressed to such a stage that when earth was dumped from cars it would be heaped up beside the track higher than the tops of the ties and rails so that it became necessary to spread it by pushing it away from the track toward the edge of the fill, in order to prevent its falling back upon the rails and to widen the embankment. To thus spread the earth an appliance called in the record a "dozer," and sometimes a "bull dozer," was used. It consisted substantially of a flat car body with adjustable wings or scrapers, so designed as to remove any earth which might fall upon the rails and also to press or push that heaped up at the side of the track out to the edge of the embankment.

When a train-load of earth would arrive at the bridge the practice was to couple the "dozer" to the forward end of the cars and then they and the "dozer" would be pushed to the place at which it was desired to unload the earth. After the cars were dumped the pulling of the "dozer" back with them would scrape the earth from the tops of the rails and would push it away from the track, thus contributing to keep the track clear and to widen the embankment.

For several weeks prior to the accident complained of, Kinzell, with an assistant, had been in charge of this "dozer," using it as described, and in addition to this they were required to remove, with shovels, earth or stones which fell upon the track, so, the superintendent of the

Railway testified, as to make it safe for the operation of trains. The rails and ties had not been transferred to the embankment, but were still sustained by the bridge substructure when the accident occurred.

Kinzell was injured by what he claimed was negligence of the Company in the manner of coupling a train of cars to the "dozer" as an immediate preliminary to such an unloading and cleaning movement as we have described.

Much is made in argument of the contention that the fill in progress was not the repairing of, nor the furnishing of support to, the bridge, which, by the testimony of the engineer in charge of bridges, had about a year "of life" remaining when the accident occurred. For this reason it is contended that the principles of *Pedersen* v. *Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146, do not apply. But in the view we take of the case this is not important.

With these facts before it, the Supreme Court of Idaho, in its judgment which we are reviewing, reversed the judgment of the lower court in Kinzell's favor, solely upon the ground that he was not employed in interstate commerce at the time he was injured, and gave this as the reason for its conclusion:

"We are of the opinion that constructing a fill to take the place of a trestle which is being used in interstate commerce is new construction, and that the fill does not become a part of the railroad until it is completed and the track is placed upon it instead of upon the trestle."

Such conclusion, of course, is not derived from any construction of the act of Congress, but rests wholly upon the interpretation which the court placed upon the undisputed facts, as we have stated them.

The Federal Employers' Liability Act provides that:

"Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while

he is employed by such carrier in such commerce." (35 Stat. 65, c. 149.)

It being admitted that the Railway Company was engaged in interstate commerce, the only question for decision is whether the petitioner was employed in such commerce, within the meaning of the act as construed by this court.

In *Pedersen* v. *Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146, it is stated that a guide to a decision of such a case as we have here may be found in the questions: Was the work being done independently of the interstate commerce in which the company was engaged or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned or was it in the nature of a duty resting upon the carrier? And in other cases it is said, in substance, that in such inquiries may be found the true test of employment in such commerce in the sense intended by the act. *Shanks* v. *Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556, 558; *New York Central R. R. Co.* v. *White*, 243 U. S. 188, 192. It is also settled that the doing of work which has for its immediate purpose the furthering of the conduct of interstate commerce constitutes an employment in such commerce within the meaning of the act. *New York Central &c. R. R. Co.* v. *Carr*, 238 U. S. 260; *Louisville & Nashville R. R. Co.* v. *Parker*, 242 U. S. 13; *Pecos & Northern Texas Ry. Co.* v. *Rosenbloom*, 240 U. S. 439; *Southern Ry. Co.* v. *Puckett*, 244 U. S. 571, 573.

It is in evidence in this case, indeed, it is obvious, that the "dozer" was not called into use until the fill had reached the level of the tops of the ties and had become of such width that the earth when dumped would pile up near the track so as to fall back upon it, if not removed, and that it was used for the double purpose of keeping the rails clear for the interstate commerce passing over them and

for pushing the material to the edge of the embankment to widen it. When to this it is added that a part of Kinzell's duty was, with a shovel, to keep the track between the rails clear of earth and stones, which might fall upon it in the progress of the work, clearly it cannot be soundly said that when he was in the act of preparing to make the required use of the "dozer" he was acting independently of the interstate commerce in which the Railway Company was engaged, or that the performance of his duties was a matter of indifference to the conduct of that commerce. He was "employed" in keeping the interstate track, which was in daily use, clear and safe for interstate trains, or, as the superintendent of the Railway Company stated it, he was engaged with the "dozer" and shovel in making the track safe for the operation of trains and in avoiding delay to the commerce passing over it. Thus the case falls plainly within the scope of the decisions which we have cited, *supra*, and, regardless of what might have been said of the fill before, it had clearly become a part of the interstate railway when the petitioner was injured, for it had reached the stage where it required the work of men and machinery to keep the interstate tracks clear during further construction, and the work of such men was thereafter not only concerned with, it was an intimate and integral part of, the conducting of interstate transportation over the bridge.

We cannot doubt that the Supreme Court of Idaho fell into error in regarding the fill as new construction so unrelated to the conduct of interstate commerce over the bridge at the time the accident to the petitioner occurred that the work being done by him should be regarded as not related to or necessary to the safe conduct of that commerce, and the judgment of that court is, therefore, reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

Syllabus.

NORTHERN PACIFIC RAILWAY COMPANY ET AL. *v.* STATE OF NORTH DAKOTA ON THE RELATION OF LANGER, ATTORNEY GENERAL.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

No. 976. Argued May 5, 1919.—Decided June 2, 1919.

Under the "Federal Control Act" of March 21, 1918, c. 25, 40 Stat. 451, railroads taken over and administered under the war power pursuant to the Act of August 29, 1916, c. 418, 39 Stat. 645, and the President's Proclamation of December 26, 1917, are in the full possession and control of the Federal Government, and that Government is granted the power through the President and the Interstate Commerce Commission to fix the rates on intrastate traffic, superseding the state power over that subject. P. 148.

The Federal Control Act being an exercise of a complete, exclusive and necessarily paramount federal power (the war power) and its provision for a complete change to federal control being clear and unambiguous, there can be no room for a presumption that state control over intrastate rates was to remain unchanged because it previously existed. P. 149. *Reagan* v. *Mercantile Trust Co.*, 154 U. S. 413, distinguished.

Under § 10 of the Federal Control Act, the power of the Interstate Commerce Commission to consider rates, like the power of the President to initiate them, relates to both classes—intrastate and interstate. P. 151.

The declaration of § 15 that nothing in the act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States in relation to taxation or "the lawful police regulations of the several States," except wherein such laws, powers, or regulations may affect the transportation of troops, etc., or "the issue of stocks and bonds," cannot be interpreted as withholding the power to initiate intrastate rates under § 10. *Id.*

Where the acts of a federal official are sought to be restrained in a state court, as invasions of state power, there is jurisdiction, if the claim be not frivolous, to pass upon their legality, although, if

legal, their restraint would affect directly the interests of the United States, which cannot be impleaded; and where the decision is against their legality, this court, finding it erroneous, has jurisdiction to reverse the resulting judgment upon the merits. P. 152.

172 N. W. Rep. 324, reversed.

THE case is stated in the opinion.

Mr. John Barton Payne and *Mr. Charles Donnelly*, with whom *The Solicitor General* and *Mr. R. V. Fletcher* were on the brief, for the Director General of Railroads, maintained that the war power, limited only by the needs of the Government and independent of state lines, supported the action taken; that the act in letter and spirit shows a purpose to bring about a unified federal control, utterly inconsistent with the retention of state power over intrastate rates; and that the proviso saving "lawful police regulations" (§ 15) must be read accordingly, and subject to the particular provisions of § 10 expressly allowing the President to initiate rates, etc. The words "police regulations" are used here in contrast with "laws and powers" as applied to taxation; they include regulations for safety, health, etc. The railroads became federal agencies, not subject to state police power.

Mr. Charles W. Bunn filed a brief on behalf of the Northern Pacific Railway Co.

Mr. Frank E. Packard, with whom *Mr. William Langer*, Attorney General of the State of North Dakota, and *Mr. W. V. Tanner* were on the brief, for defendant in error:

Railroads built under acts of Congress and aided by government lands and bonds for the purpose of securing the use and benefit of such railroads for postal and military

purposes are subject to the state power to tax, *Thomson* v. *Union Pacific Ry. Co.*, 9 Wall. 579; *Union Pacific Ry. Co.* v. *Peniston*, 18 Wall. 5; and of eminent domain and of regulation. *Union Pacific Ry. Co.* v. *Burlington & Missouri River Ry. Co.*, 3 Fed. Rep. 106, and *Union Pacific Ry. Co.* v. *Leavenworth N. & S. Ry. Co.*, 29 Fed. Rep. 728.

The power to regulate and the power to tax are inherent in sovereignty—the power to tax being the more drastic of the two. Therefore, as the power to tax may be exercised in respect to the agency or instrumentality of the Federal Government, the power to regulate can likewise be exercised by the State. This was the rule laid down in *Reagan* v. *Mercantile Trust Co.*, 154 U. S. 413, where it was held that, in the absence of an express exemption from state control, it must be assumed that Congress intended the corporation to be subject to the ordinary control exercised by the State. In *Smyth* v. *Ames*, 169 U. S. 466, a statute involving railroad rates was held constitutional as applied to the Union Pacific Railroad, a government agent and instrumentality.

We think it a fair inference from the decided cases, to assume that the rail control acts involve no question of conflict between state and federal powers. The question here is not merely one of the existence of inherent power either in the National Government or in the States, but the purpose manifested by Congress to exert its powers to the exclusion of that of the States. The question of the extent to which the laws of the State have been superseded by the acts of Congress must be determined from the nature of the provisions of each and the extent to which they are in conflict. This court has repeatedly announced the rule that the question of conflict is to be determined by the ordinary rules of statutory construction and that it should not be held that the state legislation has been superseded except in cases of manifest

repugnancy. *Reid* v. *Colorado*, 187 U. S. 137, 148; *Missouri &c. Ry. Co.* v. *Haber*, 169 U. S. 613, 623.

Congress in § 10 of the Act of 1918 expressly states its intent that the carriers shall be subject to the provisions of existing law, except (1) where such laws are inconsistent with the provisions of the act or any other act applicable to federal control, and (2) except where such laws are inconsistent with any order of the President. Thus we find the rule written into the statute itself.

The power vested in the President to initiate rates is not inconsistent with the laws of the State relating to the filing and establishment of rates. The use of the word "initiate" in defining the power of a public agency is new, but manifestly it is used in the sense of proposing a rate rather than in the sense of fixing or establishing the rate. Under federal laws and in most of the States, carriers have had the power to initiate rates. This, however, has never been regarded as inconsistent with the fixing and establishment of rates by commissions nor with the obligation to comply with provisions of law respecting the filing and publication of the rates so initiated. Nor is an inconsistency created by the provision for the filing of the rates initiated by the President with the Interstate Commerce Commission. Prior to federal control rates initiated by the carriers were required to be filed with the state commissions and the Interstate Commerce Commission, and, as pointed out, since the initiation of the rate is not the fixing of that rate, there is no inconsistency in permitting a rate to be initiated by filing it with the Interstate Commerce Commission and the concurrent requirement of compliance with state laws upon the subject.

The absence of an express provision in § 10 saving the power of the States to act through the state commissions in cases involving intrastate rates is explained by the provision of § 15 saving the police power of the States. Having preserved to the States their right to make police

regulations (with certain exceptions), it was wholly unnecessary to expressly save the jurisdiction of the state authorities as was done in the case of the Interstate Commerce Commission.

The provision in § 10 would support a theory that Congress had in mind the idea of the use of the railroads as a vehicle of taxation for the support of the war, and that, regarded as such an instrument, the power of the President in the initiation of rates was unlimited. In view, however, of the provision of the section making "justness and reasonableness" the basis of the Commission's action, we do not believe the taxation theory can be maintained. Certainly those provisions of the Federal Control Act with relation to the exercise by the Interstate Commerce Commission of the powers now possessed by that body, although modified by the existence of federal control, cannot be held to be inconsistent to the point of conflict with the existence of state laws regulating the publication and fixing of "reasonable rates for its exclusively internal traffic." *Minnesota Rate Cases*, 230 U. S. 352. The provisions of the Federal Control Act, in so far as they affect the Interstate Commerce Commission, are purely restrictions or limitations upon the power of that tribunal. These provisions evidence no intent upon the part of Congress to broaden the powers of the Commission or to extend its authority over intrastate rates. It may be contended that by reason of the provision for the taking over of all the revenues of the carriers under federal control Congress intended to assume authority to fix all rates, interstate and intrastate. It should be remembered that a carrier is entitled to receive reasonable rates and that this right cannot be denied by a State, either through a commission or otherwise.

The question is as to the power in the matter of purely intrastate rates. The Government claims that the war emergency justified the exercise of the supreme power of

the Federal Government. Assume that it did. This is no reason why the law should not have said so.

The intent of Congress not to interfere with the right of the States to establish reasonable intrastate rates is evidenced by § 15 of the act.

As early as *Chicago & Northwestern R. R. Co.* v. *Fuller*, 17 Wall. 560, it was held that railroad regulatory legislation was an exercise of the police power. See also *Munn* v. *Illinois*, 94 U. S. 113; *Union Dry Goods Co.* v. *Georgia Public Service Corporation*, 248 U. S. 372, 374, 375.

It would seem unnecessary to examine the multitudinous definitions of the expressions "police powers" or "police regulations." We think the intent of Congress is apparent from the language of the proviso itself. The fact that Congress deemed it necessary to except police regulations affecting "the issue of stocks and bonds" shows that Congress deemed such laws to be police regulations. This is not consistent with the use of the term in its narrower sense. Evidently Congress had in mind the so-called Blue Sky Laws in force in various States, and felt it necessary that the carriers and the Government should be exempt from such laws during the emergency. Such a law was before this court in *Union Pacific R. R. Co.* v. *Public Service Commission*, 248 U. S. 67. Laws of this character, however, are not included within the narrower definitions of police powers or police regulations.

It is true that in its narrower sense police power is sometimes regarded as including measures for the protection of the public morals, and that one of the purposes of Blue Sky legislation is to prevent fraud. The paramount purpose of such laws, however, is to insure business prosperity and promote the economic welfare of the State.

State regulation of local rates does not "affect the transportation of troops, war materials (or) Government supplies."

The President has not been vested with authority to set

aside state laws, whenever he thinks it necessary to do so, for purposes connected with the war or for purposes connected only with the ordinary administration of railroad affairs. The act subordinates state laws to such orders as the President is validly authorized to make by the Act of March 21, 1918, and the Act of August 29, 1916. Any order not so authorized would be of no effect. This is the interpretation stated on the floors of Congress by the member in charge of the bill. 56 Cong. Rec., p. 3497.

The legislative history of the Federal Control Act shows that under the intention of Congress the States were to retain their power to regulate local rates. S. 3752; H. R. 9685; 56 Cong. Rec., pp. 1685, 1857, 1939, 1940, 1944, 2337, 2519, 2835.

When a proposed act as introduced in the legislature establishes one rule (*e. g.*, broadly empowers the President to fix rates), and during its progress through that body is changed so that, giving the words used their ordinary definite meaning, the act means something else (*e. g.*, intrastate rates to be fixed by local authorities), that fact is of the greatest importance in determining the intention of the legislature.

Mr. Charles E. Elmquist, by leave of court, filed a brief as *amicus curiæ* on behalf of thirty-seven States and the National Association of Railway and Utilities Commissioners.

Mr. Chief Justice White delivered the opinion of the court.

In taking over the railroads from private ownership to its control and operation, was the resulting power of the United States to fix the rates to be charged for the transportation services to be by it rendered subordinated to the asserted authority of the several States to regulate the

rates for all local or intrastate business, is the issue raised on this record. It arises from the allowance by the court below of a peremptory writ of mandamus commanding the Director General of the Railroads, appointed by the President, and the officers of the Northern Pacific Railway Company to desist from charging for transportation in intrastate business in North Dakota the rates fixed by the United States for such services. When this command was obeyed, the mandamus ordered that the Director General should thereafter exact for the services stated only lesser rates which were fixed in a schedule on file with the State Utilities Commission prior to the bringing of suit and which rates under the law of North Dakota could not be changed without the approval of the Utilities Commission. In the opinion of the court below it was stated that all the parties admitted that there was no question as to the jurisdiction to consider the controversy and that they all also agreed that no contention was presented as to the power of Congress to enact the law upon which the controversy depended, as the correct interpretation of such law was the only issue to be decided. We consequently put those subjects temporarily out of view. We say temporarily, since, even upon the assumption that issues concerning them necessarily inhere in the cause and cannot be waived by the parties, we could not decide concerning such issues without interpreting the statute, which we proceed to do.

On the 29th of August, 1916 (39 Stat. 645), Congress gave the President power "in time of war . . . to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable." War with Germany was declared in April, 1917, and with Austria on December 7th of the same year

(40 Stat. 1; *ib.* 429). On December 26, 1917, the President, referring to the existing state of war and the power with which he had been invested by Congress in August, 1916, proclaimed that:

"Under and by virtue of the powers vested in me by the foregoing resolutions and statute, and by virtue of all other powers thereto me enabling, [I] do hereby . . . take possession and assume control at 12 o'clock noon on the twenty-eighth day of December, 1917, of each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States and consisting of railroads, and owned or controlled systems of coastwise and inland transportation, engaged in general transportation, whether operated by steam or by electric power, including also terminals, terminal companies and terminal associations, sleeping and parlor cars, private cars and private car lines, elevators, warehouses, telegraph and telephone lines and all other equipment and appurtenances commonly used upon or operated as a part of such rail or combined rail and water systems of transportation;—to the end that said systems of transportation be utilized for the transfer and transportation of troops, war material and equipment, to the exclusion so far as may be necessary of all other traffic thereon; and that so far as such exclusive use be not necessary or desirable, such systems of transportation be operated and utilized in the performance of such other services as the national interest may require and of the usual and ordinary business and duties of common carriers." [40 Stat. 1733.]

By the proclamation a Director General of Railroads was appointed with full authority to take possession and control of the systems embraced by the proclamation and to operate and administer the same. To this end the Director General was given authority to avail himself of the services of the existing railroad officials, boards of

directors, receivers, employees, etc., who were authorized to continue to perform their duties in accordance with their previous authority "until and except so far as said Director shall from time to time by general or special orders otherwise provide." Limited by the same qualification the systems of transportation taken over by the Government were made subject to existing statutes and orders of the Interstate Commerce Commission and to all statutes and orders of regulating commissions of the various States in which said systems or any part thereof might be located. In addition, however, to the limitation previously stated the proclamation in express terms declared: "But any orders, general or special, hereafter made by said Director, shall have paramount authority and be obeyed as such."

The proclamation imposed the duty upon the Director General to negotiate with the owners of the railroad companies for an agreement as to compensation for the possession, use and control of their respective properties on the basis of an annual guaranteed compensation and with reservations in the interest of creditors, bondholders, etc. The proclamation in concluding declared that "from and after twelve o'clock on said twenty-eighth day of December, 1917, all transportation systems included in this order and proclamation shall conclusively be deemed within the possession and control of said Director without further act or notice." Carrying out the authority exerted by the proclamation, the railroads passed into the possession, control and operation of the Director General.

On March 21, 1918, dealing with the subject, Congress passed a law entitled "An Act To provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes." [C. 25, 40 Stat. 451.] The opening sentences of the act declared: "That the President, having in time of war taken over the possession, use, control, and operation

(called herein Federal control) of certain railroads and systems of transportation (called herein carriers), is hereby authorized to agree with and to guarantee to any such carrier making operating returns to the Interstate Commerce Commission, that during the period of such Federal control it shall receive as just compensation an annual sum, payable from time to time in reasonable installments, for each year and pro rata for any fractional year of such Federal control, not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended" June 30, 1917.

Without going into detail it suffices to say that the first eight sections of the act comprehensively provided for giving effect to the purposes just stated and in a general way contemplated affording what was deemed to be just compensation to the owners for the use of their property. In addition it empowered agreements in the interest of security holders of the railroads and sanctioned provisions deemed fair to the United States and to the owners of the property for betterments which might be required to be made during the term of control and for the return of the property when the government possession came to an end, which return was to be accomplished within a stated period after the cessation of war by the proclamation of the ratification of a peace treaty.

Beyond doubt also, for the purpose of enabling the United States to perform the obligations which it assumed and to secure it from ultimate loss from the pecuniary responsibilities which might result, including the repayment to it of an appropriation of $500,000,000 which the act made applicable, all the earnings of the railroads were by the act expressly made the property of the United States.

The remaining eight sections of the act need not be stated; but as § 10, which expressly provides for the power to fix rates, and § 15, making certain reservations concern-

ing the powers granted, were greatly relied upon in the opinion below and in the argument at bar, we reproduce in the margin the more relevant portions of § 10 and the text of § 15.[1]

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[1] "Section 10. . . . That during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the commission pending final determination.

"Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations, or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and coördinated national control and not in competition.

"After full hearing the commission may make such findings and orders as are authorized by the Act to regulate commerce as amended, and said findings and orders shall be enforced as provided in said Act: *Provided, however*, That when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice shall take into consideration said finding and certificate by the President, together with such recommendations as he may make."

"Sec. 15. That nothing in this Act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States,

On May 25, 1918, the Director General made an order establishing a schedule of rates for all roads under his control and covering all classes of service, intrastate as well as interstate. The order made these rates effective on designated dates in the month of June and they were continuously enforced during a period of about eight months up to the 14th of February, 1919, when the bill in this case was filed by the State Utilities Commission for mandamus against the Director General and the officers of the Northern Pacific Railway, asserting the want of power in the United States over intrastate rates and the exclusive right of the State of North Dakota to fix such rates for all intrastate business done in that State. The Director General, admitting that he had made the order complained of and had collected the rates earned thereunder and paid them into the Treasury of the United States, sustained his action and denied the alleged right of the State upon the legislation and official acts which we have stated. The Northern Pacific denied interest on the ground that its railway had passed under federal control and that it was receiving the compensation therefor which had been agreed on between itself and the United States. It alleged that the rates under the order complained of had been collected by the Director General through agents appointed by him who were not officials of the company and therefore it had no responsibility concerning them. The prayer was that it be dismissed from the suit.

Taking the case under the complaint, the returns and the exhibits, the court, as we have previously stated, two of its members dissenting, denied the authority of the United States and upheld that of the State, and the mandamus was made peremptory as to both the Director

except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds."

General and the officers of the Northern Pacific Railway. We are thus brought to the question whether the state authority controls the power of the United States as to intrastate rates.

No elaboration could make clearer than do the Act of Congress of 1916, the proclamation of the President exerting the powers given, and the Act of 1918 dealing with the situation created by the exercise of such authority, that no divided but a complete possession and control were given the United States for all purposes as to the railroads in question. But if it be conceded that despite the absolute clarity of the provisions concerning the control given the United States, and the all-embracing scope of that control, there is room for some doubt, the consideration of the general context completely dispels hesitancy. How can any other conclusion be reached if consideration be given the comprehensive provisions concerning the administration by the United States of the property which it was authorized to take, the financial obligations under which it came and all the other duties and exactions which the act imposed, contemplating one control, one administration, one power for the accomplishment of the one purpose, the complete possesssion by governmental authority to replace for the period provided the private ownership theretofore existing? This being true, it must follow that there is no basis for the contention that the power to make rates and enforce them which was plainly essential to the authority given was not included in it.

Conclusive as are these inferences, they are superfluous, since the portion of § 10 as previously reproduced in the margin in express terms confers the complete and undivided power to fix rates. The provision is this: "That during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and prac-

tices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the commission pending final determination." These quoted words are immediately followed by provisions further defining the power of the Commission and its duty in the premises, so as to enable it beyond doubt to consider the situation resulting from the act and to which the rates were to be applied. The unison between that which is inferable and that which is expressed demonstrates the true significance of the statute.

A brief consideration of the contentions relied upon to the contrary will at once show either their inappositeness, the mistaken premises upon which they rest, or the errors of deduction upon which they proceed. It is argued that as state control over intrastate rates was the rule prior to the enactment of the statute creating United States control, the statute must be interpreted in the light of a presumption that a change as to state control was not made. But in view of the unambiguous provision of the statute as to the new character of control which it created, the principle of interpretation applied in its ultimate aspect virtually was: that because the statute made a fundamental change, it must be so interpreted as to prevent that change from becoming effective.

Besides, the presumption in question but denied the power exerted in the adoption of the statute, and displaced by an imaginary the dominant presumption which arose by operation of the Constitution as an inevitable effect of the adoption of the statute, as shown by the following:

(a) The complete and undivided character of the war power of the United States is not disputable. *Selective Draft Law Cases*, 245 U. S. 366; *Ex parte Milligan*, 4 Wall. 2; *Legal Tender Cases*, 12 Wall. 457; *Stewart* v. *Kahn*, 11 Wall. 493. On the face of the statutes it is manifest that

they were in terms based upon the war power, since the authority they gave arose only because of the existence of war, and the right to exert such authority was to cease upon the war's termination. To interpret, therefore, the exercise of the power by a presumption of the continuance of a state power limiting and controlling the national authority was but to deny its existence. It was akin to the contention that the supreme right to raise armies and use them in case of war did not extend to directing where and when they should be used. *Cox* v. *Wood*, 247 U. S. 3.

(b) The elementary principle that under the Constitution the authority of the Government of the United States is paramount when exerted as to subjects concerning which it has the power to control, is indisputable. This being true, it results that although authority to regulate within a given sphere may exist in both the United States and in the States, when the former calls into play constitutional authority within such general sphere the necessary effect of doing so is, that to the extent that any conflict arises the state power is limited, since in case of conflict that which is paramount necessarily controls that which is subordinate.

Again, as the power which was exerted was supreme, to interpret it upon the basis that its exercise must be presumed to be limited was to deny the power itself. Thus, once more it comes to pass that the application of the assumed presumption was in effect but a form of expression by which the power which Congress had exerted was denied. In fact, error arising from indulging in such erroneous presumption permeates every contention. To illustrate: Because in *Reagan* v. *Mercantile Trust Co.*, 154 U. S. 413, and other cases unnecessary to be referred to, it was held that it would be presumed that Congress in creating a corporation intended that it should be subject to applicable state laws and regulations so far as Congress did not otherwise provide, therefore, because Congress had

taken over to the Government of the United States property to be used by it in the performance of a governmental function, Congress must be presumed to have intended that such property (and such function) should continue to be subject to and controlled by state power.

The confusion produced is again aptly illustrated by the rule of interpretation by which it is insisted that the express power to fix rates conferred by the statute was rightly disregarded. Thus, while admitting that the power which was conferred to initiate rates when considered in and of itself included all rates, it is nevertheless said that such power must be presumed to be limited to the only character of rates which under the prior law the Interstate Commerce Commission had the power to consider, that is, interstate rates, because the new rates when initiated were to be acted upon by that body. As, however, the statute in terms gives power to the Interstate Commerce Commission to consider the new rates in the light of the new and unified control which it creates, the error in the contention becomes manifest, even putting out of view the fact that by the effect of the duty imposed and the new control created the new rates applying to the new conditions were within the purview of the power which the Interstate Commerce Commission previously possessed. Certainly, to mistakenly disregard one provision of the statute intended to give effect to another and upon that basis to decide that the statute is not enforceable, cannot be said to be a correct interpretation. And this view is also true as to the application which was made of the asserted presumption to the excepting clauses of § 15, previously reproduced in the margin, since that section in the light of the purpose to retain the prior law is interpreted so as to cause it to be but an additional means of destroying the all-embracing power to inititate rates fixed by § 10.

It follows that the judgment below was erroneous. The

relief afforded against the officer of the United States proceeded upon the basis that he was exerting a power not conferred by the statute, to the detriment of the rights and duties of the state authority, and was subject therefore to be restrained by state power within the limits of the statute. Upon the premise upon which it rests, that is, the unlawful acts of the officers, the proposition is undoubted, but in view of our conclusion that the acts of the officers complained of were authorized by the law of the United States, the question arises how far, that being established, it results that the suit was one against the United States over which there was no jurisdiction within the rulings in *Belknap* v. *Schild*, 161 U. S. 10; *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601; *Louisiana* v. *McAdoo*, 234 U. S. 627; *Minnesota* v. *Hitchcock*, 185 U. S. 373; *Wells* v. *Roper*, 246 U. S. 335.

The principle of these cases, however, can only be applicable by giving effect to the conclusion we have reached as to the legality of the acts of the officers which were complained of, and to decide which question the United States was not a necessary party. This is undoubtedly true unless it can be said that the contentions concerning the want of power in the officers were so unsubstantial and frivolous as to afford no basis for jurisdiction and hence caused the suit to be from the beginning directly against the United States. As, however, we are of the opinion that there is no ground for that view, it follows that the case as made gave jurisdiction to dispose of the question of wrong committed by the officials, and that a decree giving effect to our conclusion on that subject will dispose of the entire case.

Our decree therefore must be and it is

Reverse and remand for further proceedings not inconsistent with this opinion.

MR. JUSTICE BRANDEIS concurs in the result.

PUBLIC SERVICE COMPANY OF NORTHERN ILLINOIS *v.* CORBOY, DRAINAGE COMMISSIONER OF THE CALUMET DITCH.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

No. 258. Argued March 20, 1919.—Decided June 2, 1919.

The District Court has jurisdiction over a suit to enjoin a state officer, acting under color of his official authority, from executing a state law in alleged violation of constitutional rights, even though such injunction may, in effect, render the law inoperative until the constitutional question has been judicially determined. P. 159.

Section 265 of the Judicial Code, forbidding the granting of injunctions by courts of the United States to stay proceedings in any state court, except when authorized in bankruptcy cases, refers only to proceedings in which a final judgment or order has not been entered and in which the power exerted is judicial as distinguished by the Constitution from powers legislative and executive. *Id.*

Where a state law empowers a court, on petition made and on notice to property owners, to establish drainage districts, assess benefits, and appoint commissioners to carry on the work under the court's supervision, a suit in the District Court by a resident of another State, not a party to such a proceeding, to enjoin the commissioner so appointed from constructing a ditch so authorized upon the ground that it would impair plaintiff's constitutional rights in a stream in its State of residence without due process of law is not inhibited by Jud. Code, § 265. *Id.*

Questions of comity and of the sufficiency of the plaintiff's averments to justify relief are not before this court on a direct appeal involving only the jurisdiction of the District Court. P. 162.

Reversed.

THE case is stated in the opinion.

Mr. Buell McKeever, with whom *Mr. Charles W. Smith*, *Mr. Gilbert E. Porter* and *Mr. William G. Beale* were on the briefs, for appellant:

The sole question for the consideration of this court is one of jurisdiction. Jud. Code, § 238; *Mexican Central Ry. Co.* v. *Eckman*, 187 U. S. 429, 432; *Venner* v. *Great Northern Ry. Co.*, 209 U. S. 24, 30; *Simon* v. *Southern Ry. Co.*, 236 U. S. 115, 121.

The construction of the ditch, whether considered an act of the circuit court of Porter County or an act of the drainage commissioner as an agent of the State, is not a judicial proceeding within the meaning of § 265, but merely a legislative, executive or administrative act, and as such may be enjoined by a federal court.

The distinction between proceedings judicial and proceedings legislative, executive or administrative, although taking place in a body which in its principal aspect is a court, has been repeatedly recognized by this court in construing § 265. Proceedings which are legislative, executive or administrative in character, although taken in a state court, may be enjoined by a federal court. *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 225–7; *Mississippi Railroad Commission* v. *Illinois Central R. R. Co.*, 203 U. S. 335, 341; *Louisville & Nashville R. R. Co.* v. *Garrett*, 231 U. S. 298; *Southern Ry. Co.* v. *Greensboro Ice & Coal Co.*, 134 Fed. Rep. 82, 94; affd. in *McNeill* v. *Southern Ry. Co.*, 202 U. S. 543; *Crapo* v. *Hazelgreen*, 93 Fed. Rep. 316; *Delaware, Lackawanna & Western R. R. Co.* v. *Stevens*, 172 Fed. Rep. 595, 608–610; *Western Union Telegraph Co.* v. *Myatt*, 98 Fed. Rep. 335, 342, 346–347, 355, 360–361; *Weil* v. *Calhoun*, 25 Fed. Rep. 865, 870–871.

After the entry of the final decree of the state court establishing the ditch, confirming the assessments and assigning the construction of the ditch to a drainage commissioner, the proceedings passed beyond the control of the original petitioning land owners, who thereafter had no right or authority either to dismiss the petition or abandon the proposed improvements. Appellee then stood for and represented such land owners. Any collat-

eral attack thereafter upon the ditch proceeding may not be brought against the original petitioners but must be brought against such commissioner. *Board of Commissioners* v. *Jarnecke*, 164 Indiana, 658; *Furness* v. *Brummitt*, 48 Ind. App. 442; *Carter* v. *Buller*, 159 Indiana, 52.

The drainage proceeding was in fact a suit of a private character for the special benefit of the owners of the lands proposed to be drained, who are now represented by appellee. Although appellant because of the state practice may not directly enjoin such owners from obtaining the benefit of the decree establishing the ditch, nevertheless, it should not for that reason be deprived of all relief in a federal court. Since appellee stood for and represented the owners of the lands proposed to be drained, appellant's bill against him was in substance and effect merely a bill to enjoin him from obtaining for such owners the benefit of a decree affecting the property of appellant, which was void as against appellant for want of jurisdiction, and the District Court should have retained jurisdiction of the bill. *Simon* v. *Southern Ry. Co., supra; Hunt* v. *New York Cotton Exchange*, 205 U. S. 322; *Colorado Eastern Ry. Co.* v. *Chicago, Burlington & Quincy Ry. Co.*, 141 Fed. Rep. 898; *Marshall* v. *Holmes*, 141 U. S. 589, 596–600; *Smyth* v. *Ames*, 169 U. S. 466, 516; *Arrowsmith* v. *Gleason*, 129 U. S. 86, 98–101.

Mr. John H. Gillett and *Mr. Frank B. Pattee*, with whom *Mr. Randall W. Burns* was on the brief, for appellee:

The attempt to restrain the drainage commissioner is in effect the same as an attempt to restrain the proceedings. *Dietzsch* v. *Huidekoper*, 103 U. S. 494; *French* v. *Hay*, 22 Wall. 250; *Western Union Telegraph Co.* v. *Louisville &c. R. Co.*, 218 Fed. Rep. 628; *Union Pacific Co.* v. *Flynn*, 180 Fed. Rep. 565; *Rensselaer &c. R. Co.* v. *Bennington &c. R. Co.*, 18 Fed. Rep. 617; *Hyattsville &c. Assn.* v. *Bouic*, 44 App. D. C. 408.

The provisions of § 265 of the Judicial Code extend to the entire proceedings, from the commencement of the suit until the decree is performed. *Sargent* v. *Helton*, 115 U. S. 348; *Chapman* v. *Brewer*, 114 U. S. 158; *Wayman* v. *Southard*, 10 Wheat. 1; *Leathe* v. *Thomas*, 97 Fed. Rep. 136; *Fenwick Hall Co.* v. *Old Saybrook*, 66 Fed. Rep. 389; *Amusement &c. Co.* v. *El Paso &c. Co.*, 251 Fed. Rep. 345.

Section 265 inhibits the granting of an injunction against proceedings in a state court even where the jurisdiction is attacked. *American Assn.* v. *Hurst*, 59 Fed. Rep. 1; *Mills* v. *Provident &c. Co.*, 100 Fed. Rep. 344; *Phelps* v. *Mutual Reserve Fund Life Assn.*, 112 Fed. Rep. 453; affd. 190 U. S. 159.

It is not material that the bill seeks to present a constitutional question. *Aultman & Taylor Co.* v. *Brumfield*, 102 Fed. Rep. 7, 11.

The subject-matter was in the possession, actual or constructive, of appellee, as commissioner, who was to all intents and purposes a receiver, and, therefore, the property was *in custodia legis*, and not subject to the writs of other courts. *Wiswall* v. *Sampson*, 14 How. 52, 65; *Palmer* v. *Texas*, 212 U. S. 118.

The mere fact that a stranger may be prejudiced by the proceeding, the defect not appearing on the face of the record, does not render the judgment void.

Even after the rendition of the decree establishing the drain and ordering the work constructed, the cause continued to pend in the state court, to all intents and purposes as in the case of a receivership, with power on the part of the court not only to enforce the direct provisions of the statute concerning the duties of the commissioner, but with power to meet any situation which might develop in the course of the construction of the drain. *Mak-Saw-Ba Club* v. *Coffin*, 169 Indiana, 204; *Rogers* v. *Voorhees*, 124 Indiana, 469; *Murray* v. *Gault*, 179 Indiana, 658; *Steele* v. *Hanna*, 117 Indiana, 333; *Karr* v. *Board*, 170 Indiana, 571.

The proceeding was not legislative, since it involved the awarding of rights granted by existing laws. If the legislature sees fit to make provision for the determination by a judicial tribunal of the right to the relief provided for by the statute, after an inquiry involving the determination of questions of law and fact, had after the manner of the common law, such proceedings are judicial, and the proceedings constitute a suit in the state court, concerning which the District Court of the United States cannot interfere from the time that the petition is filed until the drain is constructed and the commissioner discharged. *Boom Co.* v. *Patterson*, 98 U. S. 403; *Union Pacific R. Co.* v. *Myers*, 115 U. S. 1; *County of Upshur* v. *Rich*, 135 U. S. 467; *In re The Jarnecke Ditch*, 69 Fed. Rep. 161.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

An "Act concerning drainage," passed in Indiana in 1907, briefly outlined is as follows: (1) It authorized the appointment by the county commissioners of each county of an officer called a drainage commissioner and made the county surveyor also ex officio such an officer. (2) It empowered a defined circuit court, on the petition of private land owners or of municipal or other public bodies representing public ownership, to establish a drainage district and to authorize the carrying out in such district of the work petitioned for, and gave the court authority to appoint an additional drainage commissioner, the three being directed to aid the court to the extent by it desired in securing data concerning the questions required to be passed upon in disposing of the petition. (3) To accomplish the purposes of the statute, personal notice to known property holders and notice by publication to those unknown was exacted, and the court was empowered to reject the whole suggested scheme or to authorize such part

of it as might be deemed best, or to devise and sanction a new plan. (4) As to any plan which it authorized, the court was empowered to provide for the cost of the work by distributing the amount upon the basis of the benefits to be received and the burdens to result to each land owner. (5) It authorized the designation by the court of one of the drainage commissioners, or if it deemed best, of any other resident of the district, to carry into execution under the general supervision of the court any work authorized, with power to contract and subject to accountability to the court as the work progressed and at its conclusion.

The Little Calumet River, rising in the State of Indiana, flows in a westerly direction across Porter and Lake Counties in that State into Cook County, Illinois, within whose boundaries it commingles with the Grand Calumet which empties into Lake Michigan.

After proceedings under the statute, the circuit court of Porter County, in May, 1911, established a drainage district in Porter and Lake Counties and authorized the construction of a ditch to proceed from the Little Calumet River in a northerly direction to Lake Michigan. This action of the court was taken to the Supreme Court of Indiana and there affirmed (182 Indiana, 178), and on error from this court was also affirmed (242 U. S. 375).

Before work on the ditch was commenced, however, the appellant, an Illinois corporation which was not a party to the proceedings to establish the district, brought this suit against Corboy, the drainage commissioner appointed by the court to do the work, to enjoin the execution of the same. The relief prayed was based on the ground that the effect of the ditch would be to draw off from the Little Calumet River, an interstate stream, such a quantity of water as to seriously diminish the flow in that river and thereby practically cripple, if not destroy,

the capacity of petitioner to continue to operate a plant for the production of electrical energy established and owned by it on the banks of the Little Calumet in Cook County, Illinois. It was alleged that the right to have the river flow in its normal volume was a property right enjoyed by petitioner under the law of Illinois, protected by the constitutions both of the State and of the United States, and which therefore could not be impaired or taken away without depriving the petitioner of property in violation of due process of law as afforded by both constitutions. The court, being of opinion that the relief prayed was prohibited by § 265 of the Judicial Code, dismissed the bill for want of jurisdiction. The case is here by direct appeal on that question alone.

Although a State may not be sued without its consent, nevertheless a state officer acting under color of his official authority may be enjoined from carrying into effect a state law asserted to be repugnant to the Constitution of the United States even though such injunction may cause the state law to remain inoperative until the constitutional question is judicially determined. The doctrine is elementary, but we refer to a few of the leading cases by which it is sustained: *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 9; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 392; *Ex parte Young*, 209 U. S. 123, 152; *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 230; *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278; *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 506.

There was jurisdiction therefore in the court below as a federal court to afford appropriate relief unless the want of power resulted from the prohibition of § 265 of the Judicial Code, which is as follows:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State except in cases where such injunction

may be authorized by any law relating to proceedings in bankruptcy."

In *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, the facts, briefly stated, were these: By the constitution and laws of Virginia the Corporation Commission of that State was constituted a court and was authorized in that capacity to establish railroad rates and to enforce them. The authority thus conferred was exerted and the jurisdiction of a court of the United States was invoked to enjoin the Commission from enforcing the rates so fixed on the ground that to put them in operation would amount to a confiscation of the property of the railroad and hence would be repugnant to the Constitution of the United States. The power to afford relief was challenged on the ground that as the Corporation Commission was a court under the constitution and law of the State, its proceedings could not be stayed by a court of the United States because of the prohibition of § 265 of the Judicial Code. It was held, however, that as the power to fix rates was legislative and not judicial, the prohibition had no application and the injunction prayed was granted.

In *Simon* v. *Southern Ry. Co.*, 236 U. S. 115, suit was brought in a court of the United States by the Railway Company against Simon to enjoin the enforcement of a judgment which had been rendered in a state court in favor of Simon and against the Railway Company on the ground of want of notice and fraud. Asserting that to grant the relief would be to stay proceedings in the state court, the jurisdiction was disputed, based upon the prohibition of the section previously quoted. The jurisdiction was upheld and it was decided that although the prohibition might have prevented the granting of an injunction staying proceedings before the judgment was rendered, it did not so operate after the entry of the final judgment because "when the litigation has ended and a final judgment has been obtained—and when the plaintiff endeavors

to use such judgment—a new state of facts, not within the language of the statute may arise." The execution of the judgment was therefore enjoined.

This conclusion was sustained by the text as elucidated by the purely remedial purposes intended to be accomplished by its enactment. The court thus stated the origin of the statute as illustrative of its remedial scope (pp. 123–4):

"In 1793, when that statute was adopted (1 Stat. 334), courts of equity had a well-recognized power to issue writs of injunction to stay proceedings pending in court,—in order to avoid a multiplicity of suits, to enable the defendant to avail himself of equitable defenses and the like. It was also true that the courts of equity of one State or country could enjoin its own citizens from prosecuting suits in another State or country. *Cole* v. *Cunningham*, 133 U. S. 107. This, of course, often gave rise to irritating controversies between the courts themselves which could, and sometimes did, issue contradictory injunctions.

"On principles of comity and to avoid such inevitable conflicts the act of 1793 was passed."

Be this as it may, it is certain that the prohibitions which the statute imposes secure only the right of state courts to exert their judicial power; that is, a power called into play alone between parties to a controversy, and the operation of which power when exerted was, from the very fact that it was judicial, confined to the parties, their duties, interests and property, in other words, to a power falling within the general limitation of things judicial as demarked by the great distinction between legislative, executive and judicial power upon which the Constitution was framed. This is the necessary result of the ruling in the *Prentis Case*, by which it is made certain that although a State may have power to confer upon its courts such authority as may be deemed appropriate, it cannot by

the exertion of such right draw into the judicial sphere powers which are intrinsically legislative and executive or both, and thus bring the exercise of such powers within the scope of the prohibition of the statute, with the result of depriving the courts of the United States to that extent of their omnipresent authority to enforce the Constitution.

It follows necessarily, therefore, that although the Constitution did not limit the power of the States to create courts and to confer upon them such authority as might be deemed best for state purposes, that right could not, by its exertion, restrain or limit the power of the courts of the United States by bringing within the state judicial authority subjects which in their constitutional sense were non-judicial in character and therefore not within the implied or express limitation by which courts of the United States were restrained from staying judicial proceedings in state courts. To hold to the contrary would be in large measure to recognize that the exertion of the authority of the courts of the United States was dependent, not upon the nature and character of the subject-matter with which they are called upon to deal, but merely upon a state classification.

This conclusion renders it unnecessary to consider whether the construction of the ditch under the authority of the state statute, isolatedly considered, could be regarded as a judicial proceeding within the meaning of the statute, or whether, putting that view aside under the assumption that the proceedings were judicial, the order for construction could be treated as final and for that reason alone capable of being stayed, within the ruling of *Simon* v. *Southern Ry. Co.*

The arguments at bar pressed upon our attention considerations based upon the assumed application of general principles of comity, but as on this direct appeal we have power alone to consider questions of the jurisdiction of the court below as a federal court, they are not open to our

consideration. *Louisville Trust Co.* v. *Knott*, 191 U. S. 225. This moreover puts out of view the argument advanced concerning the adequacy of the averments of the bill to justify relief, since that subject necessarily, for the reasons stated, must be left to the consideration of the court below when it exercises jurisdiction of the cause.

Our order, therefore, is that the decree be reversed and the case be remanded for further proceedings in conformity with this opinion.

Reversed.

DAKOTA CENTRAL TELEPHONE COMPANY ET AL. *v.* STATE OF SOUTH DAKOTA EX REL. PAYNE, ATTORNEY GENERAL, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

No. 967. Argued May 5, 6, 1919.—Decided June 2, 1919.

The Joint Resolution of July 16, 1918, c. 154, 40 Stat. 904, authorizing the President during the continuance of the present war, whenever he shall deem it necessary for the national security or defense, to take possession and assume control, *inter alia*, of any telephone line or any part thereof, and operate it as may be needful or desirable for the duration of the war, is within the war power of Congress. P. 183. *Northern Pacific Ry. Co.* v. *North Dakota*, *ante*, 135.

Whether the exercise of the power so conferred was justified by the conditions at the time, or was actuated by proper motives, are questions of executive discretion not within the cognizance of the judiciary, under the Constitution. Pp. 184, 187.

The Joint Resolution, *supra*, authorized the complete possession, control and operation of telephone lines by the United States, including the fixing of rates for local service, as brought about through the President's Proclamation of July 22, 1918, and the action of the Postmaster General thereunder, whereby the United States, under

contracts with the owning companies, took over their entire business and became entitled to the revenues therefrom, and fixed the rates; and this was subsequently recognized by the Act of October 30, 1918, c. 197, 40 Stat. 1017. P. 184.

The Joint Resolution, *supra*, provides that nothing therein "shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation" or their "lawful police regulations . . . , except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems." *Held*, that police power here reserved does not include the authority to make local rates, which the resolution as a whole by clear implication transfers to the United States; and that the provision as to stocks and bonds does not justify a contrary construction. P. 185.

There can be no presumption that the state rate-making power was to continue after the telephone lines and business, including the revenues, were completely taken over by the United States and were being operated as federal instrumentalities, under the war power. P. 187. *Northern Pacific Ry. Co.* v. *North Dakota*, *ante*, 135.

An erroneous judgment directly affecting the United States, reversed on the merits, see *Northern Pacific Ry. Co.* v. *North Dakota*, *ante*, 135.

171 N. W. Rep. 277, reversed.

THE case is stated in the opinion.

The Solicitor General for plaintiffs in error (and for respondent in *Macleod* v. *New England Telephone & Telegraph Co.*, *post*, 195.)

These suits are in effect against the United States and therefore not within the jurisdiction of the courts. They seek an injunction which, if granted, will restrain the United States in the use of property, its right to possession and operation of which is not attacked, and would compel the United States to furnish service, at risk of loss, on rates it has superseded. The defendants are operating as appointees and agents of the Government. They have no personal interest in the result. Their compensation as owners of the property is fixed. If the granting of the injunction sought should require the Government to operate these properties at a loss, the loss must be borne by

the Government. *Stanley* v. *Schwalby*, 162 U. S. 255, 270; *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601; *Louisiana* v. *McAdoo*, 234 U. S. 627; *Goldberg* v. *Daniels*, 231 U. S. 218, 221, 222; *Hopkins* v. *Clemson College*, 221 U. S. 636, 642, 648; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 456; *Wells* v. *Roper*, 246 U. S. 335; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 16, 17.

These cases are unlike those where an officer in excess of authority is invading the property of another or is withholding property from another to which the other person has a right, and are therefore different from such cases as *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605; *United States* v. *Lee*, 106 U. S. 196.

The purpose and effect of the joint resolution and proclamation was completely and exclusively to vest the possession and control of defendants' telephone systems in the President through the Postmaster General as his appointee on behalf of the United States.

The taking possession and assuming control and operation by the President under the joint resolution, constituted said systems public utilities operated by the Government, and made it the right and duty of the President and his representative to fix the charge to be paid for service.

The operation of the lines thus became a part of the war activities of the Government,—the utilization of the public utilities in its prosecution. *Ex parte Milligan*, 4 Wall. 2; *Legal Tender Cases*, 12 Wall. 457; *Stewart* v. *Kahn*, 11 Wall. 493.

Where the works of a common carrier are used by the Government to carry on a service which is used by the community, such as cars for carrying the mail, and the carrier is utilized to conduct such business, the carrier is as to it a servant of the Government and not a common carrier conducting the business as part of its business, and the rules of law prevailing between private parties

do not fix the relations of the parties. *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 225 U. S. 640, 649; *State of Alabama* v. *Burleson*, 82 So. Rep. 458; *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1, 9, 10; *Attorney General* v. *Edison Telephone Co. of London*, L. R. 6 Q. B. 244; *Railroad Commission of Louisiana* v. *Cumberland Telephone & Telegraph Co.* (Supreme Court of Louisiana.)

No police power of the State is impaired or affected by not submitting the rates fixed by the officers of the United States to state control, because not only the police regulations of the State do not affect rates made by the Government itself, but the police power does not extend to such a subject. The public has acted and fixed the rate when the public officer of the United States fixed it. The interest of the United States in this property is not private but public, and its protection would be the rule of law that the powers of a State do not extend to interference with the United States in the use of its property

The proviso to the resolution respecting the laws and powers of the States in relation to taxation or the lawful police regulations of the several States does not apply to and cover either the taxation of the United States or the regulation of prices to be charged by it for its operation of said property. If the United States was, prior to the adoption of this resolution, not subject itself to be taxed by a State in respect to property owned by it, or income therefrom, this proviso did not propose to enlarge the power of the State by subjecting the United States to such taxation. All it proposed to do was to protect the "existing laws or powers of the States in relation to taxation" from being impaired. The utmost which the resolution purported to do was to provide for the United States acquiring a right of temporary possession, control, and operation of the telegraph, telephone, etc., systems, for which it should pay. This still left the then owners of the prop-

erty as owners; and as between themselves and the United States, as a quasi-tenant, the owners are responsible to the State for, and bound to pay, the taxes thereon.

If the income of the corporation owning the telephone system was subject to taxation, then under this proviso whatever the United States Government pays to it for the use of the property would remain subject to the state income tax. It can claim no exemption because of its source.

So with the police regulations of the State, where the owner of a public-service corporation rents its property to another, such landlord still remains liable to the State for the observance of all police regulations in the primary and ordinary sense of that term, as contradistinguished from the wide definition sometimes given to the words "police power," and can not plead the renting as relieving it from liability. *Railroad Company* v. *Brown*, 17 Wall. 445, 450. But in this case it was the United States—a non-suable person, one not amenable to state jurisdiction—who was about to be put into possession and to operate the properties. The taking was, in a sense, compulsory and this might raise a question of the application of the rule. Hence, it was provided that such lessee in the conduct of its property should observe the regulations for the benefit of the safety, health, and morals of the community, which were considered as always resting upon the property, regardless of who was operating it. An exception, however, was made in favor of government messages, because these might be of such urgency in the direct conduct of the war, or the administration of the Government during the war, as to override all regulations, because of urgency. The other exception also points to the fact that only such police regulations as would continue to affect the duty and obligation of the owner of the property and not the interests of the United States, were continued to the States. It was important, in order to continue the

systems unimpaired in efficiency, and especially in condition to be restored in proper financial condition to the owners, that such systems should be able to finance themselves during this period where necessary under the then existing federal regulations as to bond and stock issues. Many of the States had heavy taxes on issues of securities, even renewed bonds, (*Union Pacific R. R. Co.* v. *Public Service Commission*, 248 U. S. 67), and also police regulations such as the Blue Sky Laws, intended to protect the public against overcapitalization, fraudulent stock issues, and the like. These provisions are often calculated to delay the issue of stocks and bonds even where haste is desirable. The action of these corporations was, therefore, withdrawn to this extent from the operation of the taxing laws and lawful police regulations existing at that time in the States. Doubtless the federal regulations existing were considered sufficient.

The lawful police regulations of the several States which are not affected by the resolution of July 16, 1918, are the police regulations in their strict and accurate sense, and do not embrace the exercise of powers falling under the definition of police powers in their broadest sense. It is to be noticed that Congress, while preserving from any effect of the resolution all existing laws and powers of the State in relation to taxation, did not use the words "police power." In its broadest signification, the term "police power" is practically synonymous with the States' reserved powers of sovereignty. *License Tax Cases*, 5 How. 504, 582, 583; *Sligh* v. *Kirkwood*, 237 U. S. 52, 59. But in its primary or ordinary meaning it embraces only the power to make regulations concerning the health, safety, morals, etc., of the public. This narrower meaning is the one more often ascribed to the term. *Manigault* v. *Springs*, 199 U. S. 473, 481.

It is well settled that the police power in the primary sense cannot be bartered away. *Stone* v. *Mississippi*, 101

U. S. 814; *Northern Pacific Ry. Co.* v. *Duluth*, 208 U. S. 583, 597. It is equally well settled that a State or its local government when so empowered may make a binding contract divesting itself for a substantial period of time of the power to regulate rates. *Home Telephone Co.* v. *Los Angeles*, 211 U. S. 273; *Minneapolis* v. *Street Ry. Co.*, 215 U. S. 417.

The power to regulate rates is subject to the limitation that it must afford to a private owner of the utility a reasonable return on his property devoted to the public use. *Smyth* v. *Ames*, 169 U. S. 466; *Stanislaus County* v. *San Joaquin &c. Co.*, 192 U. S. 201. A State in the exercise of its police power in the primary sense may regulate a business to the point of suppression without making compensation. *Mugler* v. *Kansas*, 123 U. S. 623; *Chicago &c. R. R. Co.* v. *Milwaukee*, 97 Wisconsin, 418.

The phrase "police powers" is as familiar as the phrase "power of taxation," and the use of the word *powers* in the one instance and the omission of it in the other is extremely significant.

It seems clear that if Congress had intended to confer upon the States the power to regulate the rates at which the United States will furnish telephone service, it would not have expressed that intention by a reservation to the States of their "police regulations." One does not ordinarily think of a schedule of rates as a "police regulation." The field of police regulation in the primary sense as evidenced by statutes and city ordinances, regulating height of wires, placing of poles, etc., shows the wide field of action of the proviso as construed by the Postmaster General.

When the history of the times and necessities of the situation are considered, it should require very plain language to give to this proviso a meaning which would compel these operations to be conducted, as to the most essential feature thereof, to wit, the revenues to be de-

rived therefrom to be expended in such operations not by the President and his appointees, but under the ultimate control in each State.

It is to be noticed that this resolution was approved July 16, 1918, some months after the passage of the Federal Control Act of March 21, 1918. The States would have had no more right to regulate intrastate rates without § 10 of the Federal Control Act than they have with said section in existence. The provisions of § 10, however, are very convincing as to the meaning of § 15 and of the words "the lawful police regulations" used in said section.

The meaning of these words in § 15 of the Federal Control Act is to be taken as the meaning of the same words derived from it and written into the joint resolution of July 16, 1918. *Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.*, 145 U. S. 263; *McDonald* v. *Hovey*, 110 U. S. 619, 628.

The debate on this resolution in the Senate sustains the view that the words "lawful police regulations" were used in the ordinary and primary sense.

The provisions of state statutes providing for the regulation of rates charged by private persons and corporations operating public utilities do not by their terms apply to rates charged by agents of the Government in the operation of such utilities.

Mr. Oliver E. Sweet, Assistant Attorney General of the State of South Dakota, with whom *Mr. Byron S. Payne*, Attorney General of the State of South Dakota, was on the brief, for defendant in error:

The rights of telephone companies are derived from the States. The only regulation of them in the past has been by the States, under their police powers, and the making and regulating of rates with respect to intrastate operations has always been upheld as an exercise of state police power.

163. Argument for Defendant in Error.

The controlling purpose of Congress was to unify and utilize the telephone property for the purposes of the Government in the event of an emergency such as that which paralyzed the railroads. But there is nothing in our experience to indicate in any way that the control of intrastate rates has ever been in any way needful or desirable as an aid to the Government in the prosecution of war. Under state regulation these companies had developed and extended their operations. Their rates in effect when the resolution was passed had in many instances been established after, and as a result of, exhaustive investigations by bodies authorized by law and informed by experience. In many instances those rates had received the approval of the courts. Rates established under such circumstances were entitled to the presumption that they were reasonable and fair. The purpose, therefore, of Congress in passing the resolution could not have been primarily, or even incidentally, to enable the telephone companies in time of war to increase their earnings. The controlling consideration was to facilitate the handling of governmental business, and otherwise to coördinate their facilities with other facilities under the Government's control for the more efficient conduct of the war. The regulation of intrastate rates bears no relation to this controlling purpose; and the members of Congress who voted for the resolution and discussed it in the houses of Congress were not of the view that in passing it they were authorizing administrative officers of the Federal Government to invade the domain of States' rights. The proviso unquestionably indicates that Congress gave consideration to the question of the authority of the States. If Congress had intended that the President should have the authority to initiate rates for telephone, telegraph, cable or radio systems, it could very easily have said so. When Congress passed the Federal Control Act of March 21, 1918, it authorized the Presi-

dent, under certain conditions, to initiate railroad rates. The omission of a corresponding provision in the telephone resolution indicates the intention not to confer the power to initiate telephone rates.

This controversy centers upon the construction of the words "lawful police regulations," as used in this proviso. The defendant in error contends that this language is to be interpreted in the broad sense in which police regulations and police powers have been defined by the courts in many cases in which they have considered the nature of the power exercised by the States in the regulation of the property, affairs, and rates of public utilities.

In placing upon the exercise by the States of their police regulations the limitations that the same should not affect the transmission of government communications or the issue of stocks and bonds, it is clear that Congress did not have in mind merely regulations made for the preservation of health, safety or public morals, because regulations of that character could not possibly seriously affect transmission of government communications or the issue of stocks and bonds. When it provided these limitations upon the lawful police regulations of the States it had in mind regulations which the States might make, of a character which might naturally and appreciably affect the Government's use of wire lines or the issue of securities by the telegraph and telephone companies. What Congress had in mind, and what Congress foresaw, was the possibility that a restrictive policy of rate regulation by the States might impair the credit of wire lines to such an extent that the issuance of their stocks and bonds could not be made with reasonable assurance of finding a favorable market. Because lawful police regulations is a term sufficiently broad to comprehend, not only rate regulations, but service requirements, Congress added the provision that such regulations should not affect the transmission of government communications. An unwise

policy in the regulation of rates by States might result in such a depletion of revenues as to prevent proper maintenance; or unwise requirements as to the furnishing of service for the public might interfere with the proper and necessary use by the Government for the handling of official communications. Such a purpose was entirely consistent with the main purpose of the Government in asking for control and operation during the war. The telephone companies would be greatly interested in the rates and classifications of their service in effect at the time of the termination of federal control, but during federal control the Government was to guarantee just compensation. How the Government should make good its guaranty was a matter of fiscal policy and not a matter of control or operation of the lines. In making such a guaranty the Government assumed an obligation, just as it has assumed many other obligations during the war, which it will be obliged to pay by revenues derived from one source or another. It is certain, at least, that the efficiency of governmental supervision, control or operation was not in the remotest degree dependent upon the manner in which the Government should raise the money to make its guaranty good. Congress did not say in the resolution that the funds to meet the guaranty should be raised by rates to be established by the Postmaster General. That, however, is the provision which the plaintiffs in error are now undertaking to read into the resolution by construction and interpretation. That is the only basis for their contention that the President or the Postmaster General has, or ever had, any authority to increase or otherwise regulate the rates or charges of telephone systems under federal control.

The resolution is in no sense a revenue measure. It was not passed with the legal formalities necessary in the passing of a revenue law. Nevertheless, if it means all that the plaintiffs in error contend, it is a revenue measure,

because, under their interpretation, it authorizes the collection of revenues with which the Government shall make good its guaranty of just compensation to the owners of the wire lines under its control. It is not necessary to invent any complicated construction of this language. It says that the lawful police regulations of the States shall not be affected. It was passed at a time when, under their police powers and by means of police regulations, the States had been exercising effective control over telephone companies for years.

It is a most natural assumption that if Congress had intended to completely revolutionize these conditions and the relations of the States to these utilities which they had created, Congress would unquestionably have made that intention very clear by appropriate language in the resolution. There was no occassion for inserting the term "lawful police regulations" except to assert that Congress proposed to exercise only the recognized and conceded powers of the Federal Government.

In the decisions of the courts the terms "police powers" and "police regulations" are used interchangeably and indiscriminately in many cases. If any distinction whatever is recognized it is that police regulations relate to the exercise of police powers and that through police regulations police powers are applied. We do not find in the books any authority for any other difference in the significance of these terms. *Wisconsin ex rel. Attorney General* v. *Chicago & North Western Ry. Co.*, 35 Wisconsin, 425, 591; Cooley's Constitutional Limitations, 577, 851; 31 Cyc. 903; *Smyth* v. *Ames*, 169 U. S. 466; *Hammer* v. *Dagenhart*, 247 U. S. 251; Fuller, Interstate Commerce, p. 17; *Union Dry Goods Co.* v. *Georgia Public Service Corporation*, 248 U. S. 372.

The term "lawful police regulations," as it appears in the joint resolution, has been construed in accordance with the contention of the defendant in error in decisions

rendered in the following, among other cases: *Public Service Commission of Indiana* v. *Receivers of the Central Union Telephone Co.*, Circuit Court Marion County, Indiana, decided February 21, 1919; *Indiana* v. *Indianapolis Telephone Co.*, decided in same court on same day; *Commonwealth ex rel. Attorney General* v. *Bell Telephone Co. of Pennsylvania*, Court of Common Pleas, Dauphin County, Pennsylvania, decided January 29, 1919; *Illinois* v. *Chicago Telephone Co.*, Superior Court, Cook County, Illinois; *Ohio* v. *Ohio State Telephone Co.*, Court of Common Pleas, Franklin County, Ohio, decided January 25, 1919; *Mississippi ex rel. Collins, Attorney General*, v. *Cumberland Telephone & Telegraph Co.*, 81 So. Rep. 404. A broad and liberal construction should be made of these words and of the proviso in which they are contained. The joint resolution, as a whole, is a grant of power by Congress to the President; the concluding proviso in the resolution is a limitation to that grant. It is usual that grants of power by legislation are strictly construed. Governments of enumerated and limited jurisdictions and officers possessing only powers delegated by law, are confined within the limits of the acts defining their powers. *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238. It is not reasonable to assume that, by making the President the general supervisor of the telephone lines, Congress intended to confer upon him, except in the matter of facilitating government communications, any greater rights in his relationship with the public than those which the telephone companies themselves possessed. We believe that there is the same need of local rate regulation and supervision by local authorities when the business is carried on by the Federal Government as when carried on by telegraph or telephone companies whose properties extend over the entire nation. This principle has been recognized when applied to railroads incorporated under federal law. *Smyth* v. *Ames*,

169 U. S. 466; *Reagan* v. *Mercantile Trust Co.*, 154 U. S. 413.

That the power to make and regulate rates of wire lines is a power which cannot be inferred but must be positively conferred by unambiguous language, is a proposition supported by many authorities. In *Reid* v. *Colorado*, 187 U. S. 137, the court said: "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested."

Congress cannot control intrastate rates under the commerce clause; nor under its war power, except when necessary and proper as a war measure. As in the case of enactments of Congress, so in the case of official acts of the President, it lies within the jurisdiction of the courts to determine whether the same are necessary and proper for carrying into execution any of his constitutional authority. *Mitchell* v. *Harmony*, 13 How. 115.

The only possible necessity for increasing the revenues of telephone companies that appears in this case is the necessity for the raising of revenues to enable the Government to compensate the telephone companies for the use of their property. That is not a war purpose. Plainly, the concluding proviso in the resolution indicates that in the opinion of Congress there existed no military necessity for increasing telephone toll rates. The President did not proclaim that it was needful or desirable to increase intrastate telephone rates as a war measure. Neither did the Postmaster General recite that such increases in telephone rates were necessary, or that they contributed in any way to the successful prosecution of the war. Such declaration or recital would not necessarily have determined the fact; if made, it would be the duty of the court in a proper proceeding to go behind such recitals, for otherwise it would be impossible to check the exercise of

arbitary power. *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 620; *Degge* v. *Hitchcock*, 229 U. S. 162, 171; *United States* v. *Lee*, 106 U. S. 196.

If the President undertook to control telephones by virtue of the war powers, the fact is that the exercise thereof, which it is the object of this case to test, was not undertaken until a time had arrived when the highest authorities of the Federal Government itself acknowledged that the war had ended. President's Messages of November 11, and December 2, 1918; *Pacific Lumber Co.* v. *Northwestern & Pacific R. R. Co.*, 51 I. C. C. 738; *United States* v. *Hicks*, 256 Fed. Rep. 707. These considerations have no bearing on the construction to be made of the joint resolution, but they have an important bearing upon the contention of the defendant that the Postmaster General's order of December 13, 1918, effective January 21, 1919, has any warrant as a war measure. Even if Congress might authorize the President to change and increase South Dakota intrastate rates under the war powers of Congress and the President, still no attempt was made to exercise such power during the war or pursuant to any war purpose or in accordance with any plan for prosecuting the war. The Postmaster General did not promulgate his order until after all necessity for the regulation of such rates as a war measure had passed.

Congress cannot confer legislative power upon the President to make rates for the future. *Field* v. *Clark*, 143 U. S. 649, 692, 693.

The suit is not one against the United States, the President or the Postmaster General; and its purpose was not to control revenue or property of the United States. The defendants are wrongdoers, and cannot defend upon the ground that they acted under orders which the President or Postmaster General was without authority to issue.

It is within the power of the court to determine the

limits of executive authority, and to restrain acts in excess thereof. This suit is not one to control administrative discretion, but to restrain acts in threatened violation of law and in excess of legal authority. *Ex parte Milligan*, 4 Wall. 2, 120, 121; *Hopkins* v. *Clemson College*, 221 U. S. 636, 643, 644; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619, 620.

The acts of the telephone companies sought to be enjoined are not acts of the Federal Government, because beyond its powers. It is not sought in this case to control the President's discretion, because it relates to a matter wholly beyond his jurisdiction.

Mr. William I. Schaffer, Attorney General of the Commonwealth of Pennsylvania, and *Mr. Bernard J. Myers*, Deputy Attorney General of the Commonwealth of Pennsylvania, by leave of court filed a brief as *amici curiæ*, on behalf of the Commonwealth of Pennsylvania.

Mr. Charles E. Elmquist, by leave of court, filed a brief as *amicus curiæ*, on behalf of thirty-seven States and the National Association of Railway and Utilities Commissioners.

Mr. John J. Blaine, Attorney General of the State of Wisconsin, *Mr. M. B. Olbrich*, Deputy Attorney General of the State of Wisconsin, and *Mr. Joseph E. Messerschmidt*, Assistant Attorney General of the State of Wisconsin, by leave of court, filed a brief as *amici curiæ*, on behalf of the State of Wisconsin.

Mr. Hal H. Smith, *Mr. David H. Crowley* and *Mr. Clarence D. Wilcox*, by leave of court, filed a brief as *amici curiæ*, on behalf of the City of Detroit.

Mr. H. Findlay French and *Mr. Ogle Marbury*, by leave of court, filed a brief as *amici curiæ*, on behalf of the

Protective Telephone Association of Baltimore City, Maryland, *et al.*

Mr. Albert C. Ritchie, Attorney General of the State of Maryland, by leave of court, filed a brief as *amicus curiæ*, on behalf of the State of Maryland.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Involving as this case does the existence of state power to regulate, without the consent of the United States, telephone rates for business done wholly within the State over lines taken over into the possession of the United States and which by the exercise of its governmental authority it operates and controls, it does not in principle differ from the *North Dakota Case* just announced [*Northern Pacific Ry. Co.* v. *North Dakota, ante*, 135,] where it was decided that under like conditions the State had no such power as to railroad rates. We consider this case as far as may be necessary, by a separate opinion, however, because the authority under which the control was exerted is distinct and because of the assumption in argument that this distinction begets a difference in the principles applicable.

In January, 1919, the State of South Dakota on the relation of its Attorney General and Railroad Commissioners sued the Dakota Central and other telephone companies doing business within the State to enjoin them from putting in effect a schedule of rates as to local business which it was alleged had been prepared by the Postmaster General and which it was averred the telephone companies were about to apply and enforce. It was charged that such rates were higher than those fixed by state authority and that the proposed action of the companies would be violative of state law, since the companies were under the

duty to disregard the action of the Postmaster General and apply only the lawful state rates. The duty of the relators, as state officers, to prevent such wrong was alleged,—a duty in which, it was further asserted, the State had a pecuniary interest springing from the expenditure which it was obliged to make for telephone services.

The companies answered, disclaiming all interest in the controversy on the ground that by contract, a copy of which with one of the defendant companies was annexed, their telephone lines and everything appurtenant thereto had passed into the possession and control of the United States and were being operated by it as a governmental agency. The answer also alleged that any connection of the companies through their officials or employees with the business was solely because of employment by the United States. The purpose to enforce the rates fixed by the Postmaster General was admitted and it was averred that the suit was one over which the court had no jurisdiction because it was against the United States.

The case was heard on the bill, answer, exhibits and an admission by all the parties that the contract annexed to the answer was accurate and that a similar one had been made with all the other defendants.

Assuming that Congress had power to take over the telephone lines; that it had conferred that power upon the President; that the power had by the President been called into play conformably to the authority granted, and that the telephone lines were under the complete control of the United States, the court yet held that the State had the power to fix the local rates. In reaching this conclusion the court, assuming argumentatively that the right which the United States possessed gave at least the implied authority to fix all rates, nevertheless held that such power did not embrace intrastate rates because they had been carved out of the grant of power by Congress in conferring authority on the President. It was

therefore decided that the President, the Postmaster General and those operating the telephone service under his authority were mere wrongdoers in giving effect to the rates fixed by the Postmaster General and in refusing to enforce the conflicting intrastate rates made lawful by state law. The proceedings to prevent this wrong, it was held, did not constitute a suit against the United States and the injunction prayed was granted.

The appellees do not confine their contention to the question of statutory construction below decided. On the contrary, they press questions of power which the court below assumed and did not pass upon, and insist upon a construction of the statute contrary to that which the court below took for granted as a prelude to the question of construction upon which it based its conclusion.

We must dispose of the issues thus insisted upon before testing the soundness of the interpretation of the statute upon which the court below acted, and for the purpose of considering them as well as the question of construction which the court below expressly decided, we state the case.

On the 16th of July, 1918, Congress adopted a joint resolution (40 Stat. 904, c. 154), providing:

"That the President during the continuance of the present war is authorized and empowered, whenever he shall deem it necessary for the national security or defense, to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control, or operation shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace: *Provided*, That just compensation shall be made for such supervision, possession, control, or operation, to be determined by the President; . . .

Provided further, That nothing in this Act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems."

Six days thereafter, on the 22nd of July, the President exerted the power thus given. Its exercise was manifested by a proclamation which, after reciting the resolution of Congress, declared:

"It is deemed necessary for the national security and defense to supervise and to take possession and assume control of all telegraph and telephone systems and to operate the same in such manner as may be needful or desirable;

"Now, Therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolution, and by virtue of all other powers thereto me enabling, do hereby take possession and assume control and supervision of each and every telegraph and telephone system, and every part thereof, within the jurisdiction of the United States, including all equipment thereof and appurtenances thereto whatsoever and all materials and supplies.

"It is hereby directed that the supervision, possession, control, and operation of such telegraph and telephone systems hereby by me undertaken shall be exercised by and through the Postmaster General. . . ." [40 Stat. 1807.]

The proclamation gave to the Postmaster General plenary power to exert his authority to the extent he might deem desirable through the existing owners, managers, directors or officers of the telegraph or telephone lines, and it was provided that their services might continue as permitted by general or special orders of the Postmaster

General. It was declared that "from and after twelve o'clock midnight on the 31st day of July, 1918, all telegraph and telephone systems included in this order and proclamation shall conclusively be deemed within the possession and control and under the supervision of said Postmaster General without further act or notice."

Under this authority the Postmaster General assumed possession and control of the telephone lines and operated the same. On the 31st day of October, 1918, the President through the Postmaster General, in the execution of the duty imposed upon him by the resolution of Congress to make compensation, concluded a contract with the telephone companies of the most comprehensive character covering the whole field while the possession, control and operation by the United States continued. By its terms stipulated amounts were to be paid as consideration for the possession, control and operation by the United States and the earnings resulting from such operation became the property of the United States. Although concluded in October, 1918, by stipulation the contract related back to the time when the President took over the property.

Following this, by authority of the President, the Postmaster General fixed a general schedule of rates and it was the order to put this schedule in effect which gave rise to the suit, the trial, and the resulting judgment which we have now under consideration.

That under its war power Congress possessed the right to confer upon the President the authority which it gave him we think needs nothing here but statement, as we have disposed of that subject in the *North Dakota Railroad Rate Case*. And the completeness of the war power under which the authority was exerted and by which completeness its exercise is to be tested suffices, we think, to dispose of the many other contentions urged as to the want of power in Congress to confer upon the President the authority which it gave him.

The proposition that the President in exercising the power exceeded the authority given him is based upon two considerations. First, because there was nothing in the conditions at the time the power was exercised which justified the calling into play of the authority; indeed, the contention goes further and assails the motives which it is asserted induced the exercise of the power. But as the contention at best concerns not a want of power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power. This must be since, as this court has often pointed out, the judicial may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion.

The second contention, although it apparently rests upon the assertion that there was an absence of power in the President to exert the authority to the extent to which he did exert it, when it is correctly understood amounts only to an asserted limitation on the power granted based upon a plain misconception of the terms of the resolution of Congress by which the power was given. In other words, it assumes that by the resolution only a limited power as to the telephone lines was conferred upon the President, and hence that the assumption by him of complete possession and control was beyond the authority possessed. But although it may be conceded that there is some ground for contending, in view of the elements of authority enumerated in the resolution of Congress, that there was power given to take less than the whole if the President deemed it best to do so, we are of opinion that authority was conferred as to all the enumerated elements and that there was hence a right in the President to take complete possession and control to enable the full operation of the lines embraced in the authority. The contemporaneous official steps taken to give effect to the resolu-

tion, the proclamation of the President, the action of the Postmaster General under the authority of the President, the contracts made with the telephone companies in pursuance of authority to fix their compensation, all establish the accuracy of this view, since they all make it clear that it was assumed that power to take full control was conferred and that it was exerted so as to embrace the entire business and the right to the entire revenues to arise from the act of the United States in carrying it out. Indeed, Congress in subsequently dealing with the situation thus produced would seem to have entertained the same conception as to the scope of the power conveyed by the resolution and dealt with it from that point of view. Act of October 29, 1918, c. 197, 40 Stat. 1017.

This brings us to the proposition upon which the court based its conclusion, that is, that although complete possession, exclusive control, and the right to all the revenues derived from the operation of the business were in the United States as the result of the resolution, the proclamation, and the contracts, yet as to intrastate earnings, the state power remained to "encumber" the authority of the United States, because that situation necessarily resulted from the terms of the congressional resolution.

This superficially was based on an interpretation of the resolution, but in substance was caused by the application to the clause of the resolution interpreted, of the erroneous presumption as to the continuance of state power dealt with in the *North Dakota Case*. Let us see if this is not necessarily so. The provision dealt with was the proviso of the resolution which in the first place saved "the lawful police regulations of the several States" and therefore subjected the control of the United States to the operation of such power; and in the second place prohibited the States during the United States control from exerting authority as to the issue of stocks and bonds.

It was conceded that the words "police power" were

susceptible of two significations, a comprehensive one embracing in substance the whole field of state authority and the other a narrower one including only state power to deal with the health, safety and morals of the people. Although it was admitted that the reservation, considered intrinsically, was not susceptible of being interpreted in the broader of the two lights, it was held that it was necessary to so interpret it because of the clause of the proviso prohibiting the States from legislating concerning the issue of stocks and bonds by the companies during the United States control. The reasoning was this: It was inconceivable, it was said, that the subject, stocks and bonds, should have been withdrawn from state control by an express prohibition unless that subject would have been under state control in the absence of the prohibition, a result which could only exist by giving the saving clause as to police power its widest significance. But the fact that the rule of construction applied had the result of incorporating in the act of Congress unlimited state authority merely as the result of a prohibition by Congress against the exertion of state power in a specific instance, in and of itself admonishes of the incorrectness of the rule. But its want of foundation is established by two further considerations: (1) because it causes the provision as to stocks and bonds, which was plainly enacted to preserve the financial control of the United States over the corporations, to limit if not destroy such control; (2) because by converting the prohibition against state power into an affirmative and comprehensive grant of that power, it so interprets the act as to limit the grant of authority which the act beyond doubt gave to the United States. These considerations not only show the mistake of the interpretation, but also point out the confusion and conflict which must necessarily arise from giving effect to the mistaken presumption of the continuance of state power to which we have previously referred.

Inherently the power of a State to fix rates to be charged for intrastate carriage or transmission is in its nature but derivative, since it arises from and depends upon the duty of those engaged in intrastate commerce to charge only reasonable rates for the services by them rendered, and the authority possessed by the State to exact a compliance with that duty. Conceding that it was within the power of Congress, subject to constitutional limitations, to transplant the state power as to intrastate rates into a sphere where it, Congress, had complete control over telephone lines because it had taken possession of them and was operating them as a governmental agency, it must follow that in such sphere there would be nothing upon which the state power could be exerted except upon the power of the United States, that is, its authority to fix rates for the services which it was rendering through its governmental agencies. The anomaly resulting from such conditions adds cogency to the reasons by which in the *North Dakota Case* the error in presuming the continuance of state power in such a situation was pointed out and makes it certain that such a result could be brought about only by clear expression or at least from the most convincing implication.

This disposes of the case, but before leaving it we observe that we have not overlooked in its consideration the references made to proceedings in Congress concerning the resolution at the time of its passage, and further, that we have also considered all the suggestions made in the many and voluminous briefs filed on behalf of various state authorities and individuals having interests in suits pending elsewhere, concerning the construction of the resolution. In saying this, however, we must except suggestions as to want of wisdom or necessity for conferring the power given, or as to the precipitate or uncalled for exertion of the power as conferred, from all of which we have turned aside because the right to consider them was wholly beyond the sphere of judicial authority.

In view of our conclusion we shall in this case, as we did in the previous one and for the reasons therein stated, content ourselves with reversing the judgment below upon the merits with directions for such further proceedings as may be not inconsistent with this opinion.

And it is so ordered.

MR. JUSTICE BRANDEIS dissents.

STATE OF KANSAS *v.* BURLESON, POSTMASTER GENERAL, ET AL.

IN EQUITY.

No. 31, Original. Argued May 5, 6, 1919.—Decided June 2, 1919.

Decided on the authority of *Dakota Central Telephone Co.* v. *South Dakota, ante*, 163.

Bill dismissed.

THE case is stated in the opinion.

Mr. Fred S. Jackson, with whom *Mr. Richard J. Hopkins*, Attorney General of the State of Kansas, and *Mr. A. E. Helm* were on the brief, for plaintiff:

The suit is one which may be maintained in the name of the State and of which this court has original jurisdiction.

The action of the President under the joint resolution was taken in pursuance of his authority under the civil law and not in any sense under the authority of military or martial law, nor in the exercise of his authority as commander-in-chief of the army and navy. Where federal authority is unopposed and the courts open for adminis-

188. Counsel for Defendants and Amicus Curiæ.

tration of justice, constitutional guarantees of liberty cannot be disturbed by the President, Congress, or the judiciary, in any exigency. The Constitution was intended for state of war as well as peace, and is a law for rulers as well as people. *Ex parte Milligan*, 4 Wall. 2, 142.

The suit is not one against the United States.

Congress has not delegated to the President the power to regulate telephone rates.

Congress cannot constitutionally confer upon the President the authority to arbitrarily fix and regulate telephone toll rates without any right to appeal to the courts as to the reasonableness of such rates, and without fixing any standard by which the President should fix or regulate such rates.

The Postmaster General cannot, under the joint resolution of Congress, exact from the State the payment of higher intrastate telephone toll rates than were in effect when the telephone properties were taken over by the Government in violation of the laws of the State.

The term "police regulation," even in its narrower sense, includes power to make rates.

The Kansas Public Utilities Law includes a utility operated by the Federal Government as "lessee," "trustee," or "receiver," and the State can be compelled to pay no more than the legal rates established by the commission under the provisions of the state law.

The Solicitor General, with whom *Mr. David A. Frank* was on the brief, for defendants, besides the points made in the case of *Dakota Central Telephone Co.* v. *South Dakota, ante*, 163, contended that the court had no original jurisdiction, because the suit was in effect one against the United States.

Mr. John G. Price, Attorney General of the State of Ohio, by leave of court, filed a brief on behalf of the State of Ohio, as *amicus curiæ*.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The State of Kansas, invoking the original jurisdiction of this court, filed its bill to enjoin the Postmaster General from enforcing and the defendant corporation from giving effect to a schedule of telephone rates which the Postmaster General had established and which he had directed should be applied for telephone services rendered on lines which were in the control and possession of the United States and were being operated as governmental agencies in virtue of the resolution of Congress and the proclamation of the President referred to and considered in *Dakota Central Telephone Co.* v. *South Dakota*, just announced, *ante*, 163.

The defendants insisting that the suit was not in substance against an officer to restrain the doing of unauthorized acts, but was really one to prevent an official of the United States from discharging his duty under a law of the United States, both disputed the merits and challenged the jurisdiction. The case was heard coincidentally with the *Dakota Central Telephone Case*, this day decided. As the ruling in that case establishes the want of foundation for the contention made in this, as to the illegality of the acts of the officer complained of, it follows also that what was stated in that case as to the form of our decree is likewise here controlling, and for the reasons there stated in this as in that case our decree must be and is one of dismissal of the bill.

And it is so ordered.

MR. JUSTICE BRANDEIS dissents.

BURLESON, POSTMASTER GENERAL, *v.* DEMPCY ET AL., CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF ILLINOIS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 1006. Argued May 5, 6, 1919.—Decided June 2, 1919.

Decided on the authority of *Dakota Central Telephone Co.* v. *South Dakota, ante*, 163.
Reversed.

THE case is stated in the opinion.

Mr. Henry S. Robbins, with whom *The Solicitor General* was on the brief, for appellant:

A suit against the Postmaster General or his agents, which seeks to control him in the matter of telegraph charges is in legal effect a suit against the United States.

Under the joint resolution, pursuant to which the President operates the telephone and telegraph lines, the power to fix rates, both interstate and intrastate, is in the President. The States have no power to estalish intrastate rates. Otherwise construed, the act of Congress would be unconstitutional.

The power to conduct a war is divisible into the power to provide the man power and other resources, and the power to direct their use. Thus the Constitution gives Congress only powers "to lay and collect taxes . . . to . . . provide for the common defence," "to raise and support armies," "to provide and maintain a navy," "to make rules for the government and regulation of the land and naval forces," "to provide for calling forth the

militia to execute the laws of the Union," to "provide for organizing, arming, and disciplining the militia," and to pass all laws "necessary or proper" to enable the President to make war. The above power "to make rules for the government and regulation of the land and naval forces" does not include the power to direct their operation for the reason that this latter power, although contained in the Articles of Confederation, was omitted from the Constitution. Consistently with these powers, which are conferred upon Congress, the President is made commander-in-chief of the army and navy, and is vested with all power of an executive nature. Thus Congress is given the power to provide the resources for the conduct of a war, while the President is given power to direct the use of such resources. The purpose and effect of this joint resolution was to provide the President with certain resources for the successful prosecution of the war. This was clearly a legislative act and properly pertained to Congress. Having provided the President with these particular resources, the control and operation of the lines belong to the President, not merely under the terms of the joint resolution, but by reason of the fact that such control and operation involve the exercise of the power to conduct the war. Hence, the power to control and operate the telegraph lines, given into the possession of the President by the act of Congress, belong to the President under the Constitution, and not merely under the act of Congress. It follows that his control and operation cannot be made subordinate to the will of any State.

The rate-making power is not reserved to the States under the proviso which authorizes the States to enact lawful police regulations.

The correctness of this construction appears from the purpose and policy of the act in question.

A state law establishing intrastate telegraph rates,

even if enacted under the police power, is invalid, because a direct interference with the war powers of the Federal Government.

The history of the proviso in question discloses that Congress did not intend to reserve to the States the power to establish intrastate rates.

Mr. Raymond S. Pruitt, Assistant Attorney General of the State of Illinois, with whom *Mr. Edward J. Brundage*, Attorney General of the State of Illinois, and *Mr. George T. Buckingham* and *Mr. Matthew Mills*, Assistant Attorneys General of the State of Illinois, were on the brief, for appellees:

This suit will lie to enjoin the Postmaster General.

The Postmaster General is the moving party in this litigation, and by applying to the District Court for a construction of his powers and the powers of defendants over intrastate telegraph rates, he submitted himself to the jurisdiction and protection of the court, and waived his asserted immunity from suit.

Congress by the proviso in the Joint Resolution of July 16, 1918, in effect specifically ordered that the powers thereby conferred upon the President shall not be construed to amend, repeal, impair or affect the existing police regulations of the States relative to intrastate commerce, including the fixing of reasonable intrastate rates to be charged and collected by telegraph companies.

Assuming that Congress, as a war measure, might have enacted appropriate legislation, wiping out of existence for the period of the war all state control over intrastate rates, the power to fix rates, which is legislative in its nature, could not have been legally conferred upon the President or any executive officer. *Milwaukee Electric R. & L. Co.* v. *Railroad Commission*, 238 U. S. 174, 180; *Field* v. *Clark*, 143 U. S. 649, 692.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

In a suit commenced by the Postmaster General, the members of the Public Utilities Commission of Illinois and the Attorney General of that State filed a cross-bill to enjoin the Postmaster General from enforcing telgraph rates which he had directed to be charged for services rendered over lines which were in the possession, under the control, and being operated by the United States under authority of the resolution of Congress and the proclamation of the President considered in *Dakota Central Telephone Co.* v. *South Dakota*, this day announced, *ante*, 163.

The theory of the cross-bill was that the United States in operating the lines was governed as to intrastate rates by state authority and could not lawfully exact for such services rendered any charges but those which the State sanctioned. The court below upheld this view and therefore permanently enjoined the Postmaster General from charging any other than the state rates for the intrastate business. The case is before us on appeal from the decree to that effect.

As there is no difference in legal principle as to the question of power between the *Dakota Central Telephone Case* and this, it follows that the decision in that case is conclusive here and makes certain the error committed below. In this case, therefore, as in that, as a decree of reversal will dispose of every issue in the case, it follows that the decree below must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

And it is so ordered.

MR. JUSTICE BRANDEIS dissents.

MACLEOD ET AL., CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MASSACHUSETTS, *v.* NEW ENGLAND TELEPHONE & TELEGRAPH COMPANY.

CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

No. 957. Argued May 5, 6, 1919.—Decided June 2, 1919.

Decided on the authority of *Dakota Central Telephone Co.* v. *South Dakota*, *ante*, 163.
232 Massachusetts, 465, affirmed.

THE case is stated in the opinion.

Mr. William Harold Hitchcock, Assistant Attorney General of the Commonwealth of Massachusetts, with whom *Mr. Henry C. Attwill*, Attorney General of the Commonwealth of Massachusetts, was on the brief, for petitioners:

The respondent through its officers and employees is now operating the telephone system owned by it as an instrumentality of the Federal Government.

It follows, therefore, that, if the power to regulate intrastate rates has been reserved to the States by the joint resolution under consideration, the respondent is the proper agency in Massachusetts against which the exercise of that power should be directed.

Jurisdiction of Massachusetts over the regulation of intrastate telephone rates, after action by the President under the Joint Resolution of July 16, 1918, was reserved to it by that resolution. We raise no question but that Congress had the power to authorize, or even to require, the taking over of the telegraph and telephone systems of the country by the Federal Government for military purposes and "for the common defence."

It may be conceded that it was well within the limits of federal power, when these systems had thus been taken over as a war measure, entirely to exclude the public from their use, if the exigencies of the war fairly warranted such action. When, however, it has been found not inconsistent with the purpose for which these systems had been taken over to permit the public to continue to use them, it would seem that the determination of the amount to be charged for such use had no relation whatever to the conduct of the war or the exercise of the war powers. Obviously, Congress could not authorize the taking of these systems by the Federal Government solely for revenue purposes even during time of war. It may be suggested that, the systems having been taken over and the public having been permitted to use them so far as not inconsistent with government use, it was within the power of Congress to authorize, and of the President and his representatives to exercise, the regulation of the rates to be charged for such service entirely within a State as a mere incident of government operation for war purposes. If this be so, such regulation must be strictly confined to its mere incidental purpose. It cannot be extended to make the dominant purpose of the exercise of such a power the raising of revenue or, *a fortiori*, the standardizing of telephone rates upon a uniform basis throughout the Nation in the assumed interest of the telephone users of the country, which was the admitted purpose of the establishment of the rates in question. Such action seems to go beyond the scope even of the far-reaching war powers. However, no such difficult and delicate question arises in this case. Congress foresaw the serious difficulties which might arise from such a conflict between national and state powers at a time when harmony was essential. It, therefore, appears to have determined that these most fundamental powers of the States should be interfered with as little as possible. The question now before the

court turns entirely upon the interpretation to be given to this proviso.

The language of the proviso of the joint resolution itself shows that the phrase "police regulations" is there used in its broadest sense. The express exceptions from the power reserved to the States show the breadth of that reservation. The control of the issue of stocks and bonds is but an incident of the power to control rates. If "police regulations" was here used in any narrow sense, the exception would be meaningless.

The whole resolution indicates a purpose to authorize the taking of the telegraph and telephone systems for the direct prosecution of the war, but makes clear that, to the extent that the public is to be permitted to use them as before, the regulative powers of the States should not in any wise be limited except as expressly stated. The prosecution of the war required the prompt transmission of government messages under conditions which would insure secrecy. It had no possible relation to the cost of service to private users of these systems.

The history of the joint resolution, particularly of the language of the proviso under consideration, plainly points to the same conclusion.

This suit is not beyond the jurisdiction of the Massachusetts court on the ground that the United States is a necessary party or that the suit is in effect against the United States.

The Solicitor General for respondent. See *ante*, 164.

Mr. William I. Schaffer, Attorney General of the Commonwealth of Pennsylvania, and *Mr. Bernard J. Myers*, Deputy Attorney General of the Commonwealth of Pennsylvania, by leave of court, filed a brief as *amici curiæ*, on behalf of the Commonwealth of Pennsylvania.

Mr. Charles E. Elmquist, by leave of court, filed a brief as *amicus curiæ*, on behalf of thirty-seven States and the National Association of Railway and Utilities Commissioners.

Mr. John G. Price, Attorney General of the State of Ohio, by leave of court, filed a brief as *amicus curiæ*, on behalf of the State of Ohio.

Mr. Albert C. Ritchie, Attorney General of the State of Maryland, by leave of court, filed a brief as *amicus curiæ*, on behalf of the State of Maryland.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The petitioners, composing the Public Utilities Commission of the State of Massachusetts, filed their bill against the respondent to compel it to enforce certain telephone rates for intrastate business established in conformity to the state law and to forbid the putting into effect of conflicting rates fixed by the Postmaster General in a schedule by him established and the enforcement of which he had ordered.

On the petition and answers the case was reserved for the consideration of the Supreme Judicial Court where it was finally decided. The court in a lucid opinion, speaking through Mr. Chief Justice Rugg, having after full consideration reached the conclusion that the Postmaster General was empowered by the law of the United States to fix the schedule of rates complained of and that the Telephone Company was authorized by such law to put in effect and enforce such rates even though in doing so the rate established by the Public Service Commission of the State was disregarded, held that the suit was virtually one against the United States which the court was without

195. Counsel for the United States.

power to entertain and entered a decree of dismissal for want of jurisdiction. But the form of the decree thus entered affects in no way the control and decisive result, upon every issue in the case, of the ruling this day announced in *Dakota Central Telephone Co.* v. *South Dakota*, *ante*, 163. It follows therefore that in this case our decree must be and is one of affirmance.

Affirmed.

MR. JUSTICE BRANDEIS dissents.

UNITED STATES *v.* FERGER ET AL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

No. 776. Argued April 29, 1919.—Decided June 2, 1919.

Under the commerce clause, Congress has power to deal with acts not in themselves interstate commerce but which obstruct or otherwise injuriously affect it. P. 202.

Bills of lading in interstate commerce are instrumentalities of that commerce, subject to the authority of Congress under the commerce clause. P. 204.

Judicial notice will be taken of the importance of bills of lading in interstate commerce. *Id.*

Congress has power to prohibit and punish the forgery and utterance of bills of lading for fictitious shipments in interstate commerce, as a means of protecting and sustaining that commerce. P. 205.

256 Fed. Rep. 388, reversed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Brown, with whom *Mr. Charles H. Weston* was on the brief, for the United States.

Mr. Charles E. Hughes, with whom *Mr. John C. Hermann* and *Mr. Sherman T. McPherson* were on the brief, for defendants in error.

Mr. Francis B. James, by leave of court, filed a brief on behalf of the National Industrial Traffic League, as *amicus curiæ*.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The twenty-four counts of the indictment in this case were concerned with the commission of acts defined as criminal and punished by the 41st section of the Act of August 29, 1916, entitled, "An Act Relating to bills of lading in interstate and foreign commerce." (39 Stat. 538.)

In the first count it was charged that the accused, in violation of the section, on or about the 14th day of August, 1917, in Cincinnati, Ohio,—"did . . . feloniously, and with intent to defraud, falsely make, forge and counterfeit, and aid and assist in falsely making, forging, and counterfeiting a certain bill of lading purporting to represent goods received at Fountaintown, in the State of Indiana, for shipment to Cincinnati, in the State of Ohio, and to utter and publish and aid and assist in uttering and publishing such falsely made, forged, and counterfeited bill of lading, then and there knowing the same to be falsely made, forged, and counterfeited. . . ."

A copy of the fabricated bill of lading was reproduced in the count. It was negotiable in form, following the standard approved by the Interstate Commerce Commission (Docket No. 787, June 27, 1908). The bill acknowledged the receipt by the Cincinnati, Hamilton and Dayton Railway Company of corn in bulk at a designated place in Indiana, shipped to Cincinnati to the order of the shipper, and with directions to notify a person named. It contained all the

earmarks which would have been found in a genuine bill of lading.

The second count charged the knowing, wilful and felonious uttering of the bill of lading and, with criminal intent and knowledge, obtaining money on it from the Second National Bank of Cincinnati by using it as collateral.

These first two counts are types of the remaining twenty-two, except that the latter dealt with eleven other bills of lading as to each of which there were two counts, charging in the exact words used in the first and second counts, on the one hand the felonious fabricating and uttering of a bill of lading, and on the other hand the uttering and obtaining on the same bill of money from the Second National Bank of Cincinnati.

There was a motion to quash all the counts based upon alleged defects in pleading with which we are not concerned, and by demurrer the failure of the indictment to charge an offense was asserted on these grounds:

"First. That said act of Congress . . . approved August 29, 1916, is unconstitutional and void, especially section 41 of said act in so far as it attempts to make it a crime and punish any person who forges or counterfeits a bill of lading where no shipment from one State to another is made or intended.

"Second. That said act can only apply to bills of lading representing actual shipments of merchandise or commerce between the States. If it is intended to apply to wholly fictitious shipments, it is unconstitutional and void so far as said fictitious shipments are concerned, because the power of Congress to legislate upon this subject matter is based wholly and solely upon the commercial clause of the Constitution, and if there is no commerce, there is no jurisdiction."

The demurrer was sustained and all the counts in the indictment were dismissed. The court said:

"It was agreed at the argument and assumed in the briefs of counsel that the so-called bills of lading were fictitious, in that there was no actual consignor or consignee, and that they did not relate to any shipment or contemplated shipment of corn whatsoever. This fact so agreed upon in open court is to be read into the indictments."

Dealing with the case thus made, the court observed:

"These bogus bills of lading were nothing but pieces of paper, fraudulently inscribed to represent a real contract between real people and the actual receipt of goods for interstate shipment. . . . That they were inscribed so as to purport to relate to interstate shipments was nothing else than a fraud upon such persons as innocently took them, as collateral or otherwise. The execution of them and their use for obtaining money under false pretenses was nothing other than a crime of the kind cognizable by the criminal legislation of the States, and a matter with which the Congress, in the exercise of its power to regulate commerce, is not concerned."

And upon these premises, after reviewing what were deemed to be the controlling authorities, it was concluded that the case "must be decided in favor of the defendants, and the holding made that Congress has not the power, under the commerce clause, to prescribe a punishment under the circumstances of this case, and if the Congress has sought to do so, the attempt is futile, because without authority."

Despite the hypothetical form in which this conclusion is expressed, the context of the opinion makes it certain that, reading the facts charged in the indictment in the light of the admissions made at the argument, the court construed the section of the statute as embracing such acts and decided that as thus construed it was void for repugnancy to the Constitution.

At the outset confusion in considering the issue may result unless obscurity begotten by the form in which the

contention is stated be dispelled. Thus both in the pleadings and in the contention as summarized by the court below it is insisted that as there was and could be no commerce in a fraudulent and fictitious bill of lading, therefore the power of Congress to regulate commerce could not embrace such pretended bill. But this mistakenly assumes that the power of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, instead of by the relation of that subject to commerce and its effect upon it. We say mistakenly assumes, because we think it clear that if the proposition were sustained it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, must include the authority to deal with obstructions to interstate commerce (*In re Debs*, 158 U. S. 564) and with a host of other acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves. It would be superfluous to refer to the authorities which from the foundation of the Government have measured the exertion by Congress of its power to regulate commerce by the principle just stated, since the doctrine is elementary and is but an expression of the text of the Constitution. Art. I, § 8, clause 18. A case dealing with a somewhat different exercise of power, but affording a good illustration of the application of the principle to the subject in hand, is *First National Bank* v. *Union Trust Co.*, 244 U. S. 416.

Although some of the forms of expression used in the opinion below might serve to indicate that the error just referred to had found lodgment in the mind of the court, the context of the opinion makes it certain that such was not the case, since the court left no obscurity in its statement of the issue which it decided, saying "They [the fictitious bills of lading] did not affect interstate commerce, directly or indirectly; they did not obstruct it or interfere

with it in any manner, and had nothing whatsoever to do with it, or with any existing instrumentality of it."

This statement not only clearly and accurately shows the question decided, but also with precision and directness points out the single and simple question which we must consider and dispose of in order to determine whether the court below erred in holding that the authority of Congress to regulate commerce did not embrace the power to forbid and punish the fraudulent fabrication and use of fictitious interstate bills of lading.

That bills of lading for the movement of interstate commerce are instrumentalities of that commerce which Congress under its power to regulate commerce has the authority to deal with and provide for is too clear for anything but statement, as manifested not only by that which is concluded by prior decisions, but also by the exertion of the power by Congress. Nothing could better illustrate this latter view than do the general provisions of the act, the 41st section of which is before us. See also Act of June 29, 1906, c. 3591, § 7, 34 Stat. 584, 593; Act of June 18, 1910, c. 309, 36 Stat. 539, 546; *Almy* v. *California*, 24 How. 169; *Thames & Mersey Marine Insurance Co.* v. *United States*, 237 U. S. 19, 26; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Harold*, 241 U. S. 371, 378; *Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139; *Missouri, Kansas & Texas Ry. Co.* v. *Sealy*, 248 U. S. 363. That as instrumentalities of interstate commerce, bills of lading are the efficient means of credit resorted to for the purpose of securing and fructifying the flow of a vast volume of interstate commerce upon which the commercial intercourse of the country, both domestic and foreign, largely depends, is a matter of common knowledge as to the course of business of which we may take judicial notice. Indeed, that such bills of lading and the faith and credit given to their genuineness and the value they represent are the producing and sustaining causes of the enormous number

of transactions in domestic and foreign exchange, is also so certain and well known that we may notice it without proof.

With this situation in mind the question therefore is, Was the court below right in holding that Congress had no power to prohibit and punish the fraudulent making of spurious interstate bills of lading as a means of protecting and sustaining the vast volume of interstate commerce operating and moving in reliance upon genuine bills? To state the question is to manifest the error which the court committed, unless that view is overcome by the reasoning by which the conclusion below was sought to be sustained. What was that reasoning? That the bills were but "pieces of paper, fraudulently inscribed" and "did not affect interstate commerce, directly or indirectly . . . and had nothing whatsoever to do with it, or with any existing instrumentality of it." But this rests upon the unsustainable assumption that the undoubted power which existed to regulate the instrumentality, the genuine bill, did not give any power to prevent the fraudulent and spurious imitation. It proceeds further, as we have already shown, upon the erroneous theory that the credit and confidence which sustains interstate commerce would not be impaired or weakened by the unrestrained right to fabricate and circulate spurious bills of lading apparently concerning such commerce. Nor is the situation helped by saying that as the manufacture and use of the spurious interstate commerce bills of lading were local, therefore the power to deal with them was exclusively local, since the proposition disregards the fact that the spurious bills were in the form of interstate commerce bills which in and of themselves involved the potentiality of fraud as far-reaching and all-embracing as the flow of the channels of interstate commerce in which it was contemplated the fraudulent bills would circulate. As the power to regulate the instrumentality was coëxtensive with interstate com-

merce, so it must be, if the authority to regulate is not to be denied, that the right to exert such authority for the purpose of guarding against the injury which would result from the making and use of spurious imitations of the instrumentality must be equally extensive.

We fail to understand the danger to the powers of government of the several States which it is suggested must arise from sustaining the validity of the provisions of the act of Congress in question. On the contrary, we are of opinion that to deny the power asserted would be to depart from the text of the Constitution and to overthrow principles of interpretation which, as we have seen, have been settled since *McCulloch* v. *Maryland*, 4 Wheat. 316, and which in application have never been deviated from.

This conclusion remains unshaken despite an examination of the decided cases cited by the court below in its opinion or which were pressed upon our attention in argument, since in our judgment they all but express the general principles of interpretation which we have applied and which are decisive against the contention of want of power in Congress which was upheld below and is here insisted upon.

It follows that the judgment below was wrong. It must therefore be reversed and the case be remanded for further proceedings in conformity with this opinion.

And it is so ordered.

MR. JUSTICE PITNEY dissents.

UNITED STATES v. FERGER ET AL. (NO. 2).

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

No. 777. Argued April 29, 1919.—Decided June 2, 1919.

Congress has power, under the commerce clause, to forbid and punish a conspiracy to forge and utter bills of lading for fictitious interstate shipments. *United States* v. *Ferger*, *ante*, 199.
256 Fed. Rep. 388, reversed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Brown, with whom *Mr. Charles H. Weston* was on the brief, for the United States.

Mr. Charles E. Hughes, with whom *Mr. John C. Hermann* and *Mr. Sherman T. McPherson* were on the brief, for defendants in error.

Mr. Francis B. James, by leave of court, filed a brief on behalf of the National Industrial Traffic League, as *amicus curiæ*.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

This case is disposed of by the ruling just announced in No. 776, *ante*, 199. The indictment here was for conspiring to do the various acts charged in the previous case, that is, the fraudulent fabrication and uttering of the same fictitious bills of lading and the obtaining of money thereon by delivering the same to the Second National Bank of Cincinnati as collateral. The demurrer which was sus-

tained by the court below in the previous case was also sustained as to this.

While there is a separate writ of error and a separate record in this case, it is conceded by all parties that the cases are in legal principle the same and that the decision of one concludes the other. It follows, therefore, that for the reasons stated in the previous case, No. 776, the judgment in this must be and it is reversed and the case remanded for further proceedings in conformity with this opinion.

And it is so ordered.

MR. JUSTICE PITNEY dissents.

CAPITAL TRUST COMPANY, ADMINISTRATOR OF ARNOLD, *v.* CALHOUN.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 368. Argued May 2, 1919.—Decided June 2, 1919.

For the prosecution of a claim for taking and use of private property in the Civil War, claimant agreed to pay an attorney's fee of 50% of the amount to be collected, to be a lien on any warrant to be issued in payment of the claim; the bill was referred by the Senate under § 14 of the Act of March 3, 1887, c. 359, 24 Stat. 505, now Jud. Code, § 151, to the Court of Claims, where, after evidence and trial, favorable findings were secured, upon which Congress appropriated an amount in payment, but with the restriction that no part thereof in excess of 20% should be paid to or received by any attorney on account of services rendered in connection with the claim, the act further declaring it a misdemeanor for any attorney to exact or receive for such services any sum exceeding that percentage of the amount appropriated, any contract to the contrary notwithstanding.

208. Argument for Defendant in Error.

Assuming the provision for a lien not violative of Rev. Stats., § 3477, and the contract valid when made, *held*, that while the attorney's right to collect his fee from other assets of the client was not affected, the restriction, as to the fund appropriated, was within the power of Congress, and did not deprive him of property or of liberty of contract without due process, although subsequent to the making of the contract and rendition of the services. P. 217.

177 Kentucky, 518, reversed.

THE case is stated in the opinion.

Mr. T. L. Edelen for plaintiff in error.

Mr. Joseph W. Bailey and *Mr. Charles F. Consaul* for defendant in error:

It is maintained by defendant in error that the provisions of § 4, of the Act of March 4, 1915, denying his right to collect from his former client the full compensation due under a valid contract, for his professional services rendered prior to the enactment, and making him liable to punishment for a misdemeanor in event he either compels or accepts compliance with the terms of such valid contract, are in direct derogation of his rights under the Fifth Amendment, in that the statute attempts to deprive defendant in error of his property and liberty without due process of law.

Defendant in error does not contend that, by reason of his services rendered under his contract, he acquired any right of property as against the United States. The property right so acquired is against the Arnold estate. The claim having been investigated and tried in the Court of Claims, and an appropriation having been made by Congress for payment of the sum awarded, and payment having actually been made, the amount appropriated (less the 20 per cent. received,) now in the hands of the administrator of the Arnold estate, is chargeable with payment of the residue of the agreed fee.

This right of property was acquired and held under and by virtue of professional services rendered, in accordance with a valid contract, having express statutory sanction, in no manner opposed to public policy, and was acquired prior to the enactment in question. At least from date of allowance of the claim by the Court of Claims, Calhoun had a chose in action, as against his client, under his valid contract whereunder he had completed his services. That a right of property is thus acquired by counsel has been recognized by the courts. *McGowan* v. *Parish*, 237 U. S. 285.

The instant the act was approved by the President, every individual claimant therein named became the owner of the sum appropriated to him. He could, on refusal by the Treasury officials to pay his claim, secure a mandamus compelling payment. *United States ex rel. Parish* v. *MacVeagh*, 214 U. S. 124; *Osborn* v. *Nicholson*, 13 Wall. 654.

Decisions opposed to our position herein (*Ralston* v. *Dunaway*, 123 Arkansas, 12; *Calhoun* v. *Massie*, 123 Virginia, 673) holding that counsel could acquire by their performance of services under valid contracts, no rights whereof they might not be divested by act of Congress at any time prior to actual payment of the claim, overlook the legal principle that the fee contract constituted a chose in action, and further, that a chose in action is property, regardless of whether or not there exists a present right to sue thereon. It is within the bounds of reason to say that the rights of Calhoun became vested as soon as he accepted the employment and began rendering his services. *Price* v. *Haeberle*, 25 Mo. App. 201.

It is plain that the right becomes a vested property right at least on the securing of a favorable report or allowance of the claim at the hands of the Court of Claims. *Roberts* v. *Consaul*, 24 App. D. C. 551, 559; *Schooner Zilpha*, 40 Ct. Clms. 200.

The uncertainty as to time of payment, or even the possible uncertainty as to whether Congress may appropriate for the entire amount reported, does not affect the character of this vested or property right, although it may affect its extent or value. As the claim itself constituted property, which admittedly goes to the administrator, *Erwin* v. *United States*, 97 U. S. 392, the rights of Calhoun to his compensation must likewise be property, like an estate in contingent remainder, or the interest of an assured under a policy of life insurance.

If Calhoun had died prior to payment of the claim, his property right would have passed as such to his administrator or executor, and could have been enforced. *McGowan* v. *Parish, supra.*

Legislation impairing property rights in contracts violates the Fifth Amendment.

In a certain sense it may be said that the statute here involved does not directly impair the liberty of making a contract, but it does in terms operate to deprive defendant in error of his liberty of either enforcing compliance by his client with the terms of a valid contract, or even of accepting from an honest client the agreed compensation in excess of a sum equal to 20% of the sum collected upon a claim.

With reference to what the court said in *Ex parte Garland*, 4 Wall. 333, it may be pertinently asked of what value is the right to appear in court and argue causes for suitors, if, after the attorney has performed these functions of his profession, he can be deprived by act of Congress of the fruits of his labors?

The limitation of attorney fees in pension cases was purely prospective in its operation. The theory of the court in *Frisbie* v. *United States*, 157 U. S. 160, was that, in granting or extending a privilege, Congress may simultaneously lay certain conditions upon persons, either claimants or counsel, availing themselves of such privi-

lege or extension. It by no means follows, however, that Congress may impose such conditions upon counsel, after services have been fully rendered, under valid contracts, and make such conditions practically retroactive in a manner to deprive counsel of their property rights, acquired under their contracts, and enforceable against their clients.

The limitation of counsel fees in Indian depredation claims was sustained, in *Ball* v. *Halsell*, 161 U. S. 72, as being a condition laid by Congress on the right to sue. That act did not, like the one here, seek to enact such limitation after the suit had been conducted to a termination in the Court of Claims.

In the following cases the present fee limitation has been adjudged unconstitutional and void: *Moyers* v. *Memphis*, 135 Tennessee, 263; *Black* v. *O'Hara, Admr.*, 175 Kentucky, 623; *Lay* v. *Lay*, 118 Mississippi, 549; *Newman* v. *Moyers*, 47 App. D. C. 102; *King* v. *Pons, Admr.*, 77 Florida,——. In two cases, it was sustained: *Ralston* v. *Dunaway*, 123 Arkansas, 12; *Calhoun* v. *Massie*, 123 Virginia, 673. Obviously, Congress has the power (as distinguished from the right) to decline to *appropriate* money for any purpose.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Proceeding in equity under the law of Kentucky for an accounting from the Capital Trust Company as administrator *de bonis non* of the estate of Thomas N. Arnold, deceased, and that the estate be settled and distributed.

Defendant in error Calhoun and Calhoun & Sizer, a firm composed of C. C. Calhoun and Adrian Sizer, attorneys at law, appeared in the proceeding and by cross-petition prayed judgment against the trust company as such administrator for the sum of $1504.50, with interest from July 10, 1915.

An outline of the facts is as follows: Thomas N. Arnold, prior to his death, believing that he had a just claim against the United States, entered into a contract with the firm of Calhoun & Sizer and employed it to undertake the prosecution of the claim, and on August 1, 1905, entered into a written contract with it by which, in consideration of the services rendered and to be rendered by it in the prosecution of the claim, he agreed to pay it a fee equal in amount to 50% of whatever sum of money should be awarded or collected on the claim, the payment of which was made a lien upon the claim or upon any draft or evidence of payment that might be issued in liquidation thereof.

The firm undertook the prosecution of the claim and bills were introduced in Congress for its payment, and on May 22, 1908, it was referred to the Court of Claims by a resolution of the United States Senate for findings of fact under § 14 of the Act of March 3, 1887, c. 359, 24 Stat. 505, now § 151 of the Judicial Code. About that time the firm of Calhoun & Sizer was dissolved and subsequently Arnold died and the beneficiaries of the estate entered into a written contract with defendant in error, C. C. Calhoun, to continue the prosecution of the claim and agreed to pay him 50% of the amount which might be collected, the fee to be a lien "on any warrant" which might "be issued in payment of said claim."

January 15, 1912, the Court of Claims made findings of fact in the matter of the claim and stated the amount thereof as $5015.00. The court's findings were certified to Congress and that body, by an Act approved March 4, 1915, c. 140, 38 Stat. 962, made an appropriation for the payment of the claim and the Secretary of the Treasury was directed to pay it.

The act, however, contained the following provisions:

"That no part of the amount of any item appropriated in this bill in excess of twenty per centum thereof shall be

paid or delivered to or received by any agent or agents, attorney or attorneys on account of services rendered or advances made in connection with said claim.

"It shall be unlawful for any agent or agents, attorney or attorneys to exact, collect, withhold or receive any sum which in the aggregate exceeds twenty per centum of the amount of any item appropriated in this bill on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding. Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding $1000."

June 7, 1915, Calhoun requested the Secretary of the Treasury to issue a warrant to him for the sum of $1003, which he recited was to be payable to him on account of services as attorney in the claim of the Capital Trust Company against the United States, as appropriated for by the act of Congress, the receipt of said warrant to be taken and accepted as a full and final release and discharge of any claim he had against the United States on account of services in said claim.

Afterward, on July 1, 1915, notice was given to Calhoun, as attorney for the claimant, that in settlement of the claim a check was mailed him for $1003, being 20% of the claim, and to the trust company as administrator *de bonis non* of Arnold, check for $4012. A part of this money is still in the hands of such administrator and there is no other property belonging to the estate.

The cross petition additionally asserts the following: No part of the fee except the sum of $1003 has been paid and there is a balance due of $1504.50, with interest from July, 1915, the date the money was received by the trust company.

July 10, 1915, Calhoun presented his claim to the administrator duly proved and demanded payment, but payment was refused. The whole of the $1504.50, there-

fore, remains unpaid, and Calhoun has a lien upon the fund for the payment, he having accepted the check for $1003 under protest and only on account. The contract preceded the act of Congress and when the act was passed such contracts were lawful and Congress was without authority to take from him his property without due process of law or just compensation therefor or to deprive him of his liberty of contract.

This is repeated and emphasized in various ways and the Fifth Amendment is especially invoked as sustaining it, and for which reasons it is alleged that the "attempted limitation of attorney's fees by said act" was "null and void."

A demurrer to the cross petition was overruled and the trust company answered. A detail of its averments is not necessary. It practically admits those of the cross-petition and pleads in defense the provisions of the act of Congress, and also § 3477, Rev. Stats.

A demurrer was sustained to the answer and judgment rendered for Calhoun for the sum of $1504.50, with interest from July 1, 1915. The judgment was affirmed by the Court of Appeals. The court said: "This case runs on all fours with *Black* v. *O'Hara's Admr.*, 175 Ky. 623, where it was held that the Act of Congress approved March 4, 1915, appropriating money for the payment of similar claims and containing a similar provision limiting an attorney's fee to twenty per cent. of the amount recovered, in so far as it attempted to limit the amount of a fee theretofore earned, was unconstitutional and invalid.

"We have been urged to recede from the rule announced in *Black* v. *O'Hara's Admr.*, *supra*, as being unsound in principle; but after a careful reconsideration of the reasoning by which the decision in that case is supported, we are satisfied of its soundness, and reaffirm it."

We encounter at the outset a question upon the form

of the judgment. The cross-petition was presented in a proceeding to require an accounting of the administrator of Arnold and the petition asserted a claim and lien upon the money in the administrator's hands received from the United States Government. The judgment, however, does not refer to that money or the lien upon it; it provides only that Calhoun recover of the administrator "the sum of fifteen hundred and four 50/100 dollars with interest from July 1st, 1915, and his costs herein and may have execution," etc.

If the judgment only establishes a claim against the administrator to be satisfied, not out of the moneys received from the United States but from other assets of the estate, a situation is presented which it was said in *Nutt* v. *Knut*, 200 U. S. 12, 21, would not encounter legal objection. In other words, the limitation in the act appropriating the money to 20% as the amount to be paid to an agent or attorney would have no application or be involved.

But the judgment is construed by the parties as having more specific operation, construed as subjecting the money received from the Government to the payment of the balance of Calhoun's fee, doubtless because the estate has no other property. On that account it is attacked by the trust company and defended by Calhoun. The controversy thus presented is discussed by counsel in two propositions: (1) The validity of the contract independently of the limitation imposed by Congress upon the appropriated money; (2) the power of Congress to impose the limitation as to that money. The latter we regard as the main and determining proposition; the other may be conceded, certainly so far as fixing the amount of compensation for Calhoun's services (we say Calhoun's services as the appearance of the firm of Calhoun & Sizer was withdrawn), and even so far as the contract provided for a lien, if the distinction made by counsel be tenable—that

is, a distinction between a lien on the claim and a lien "upon any draft, money, or other evidence of payment," to quote from the first agreement, or "on any warrant which may be issued in payment," to quote from the second agreement.

So far as the contract fixed the amount of fee it is within the rule of *Nutt* v. *Knut*, *supra*, and, for the sake of the argument, the lien may be conceded to be valid against § 3477, Rev. Stats., to the contrary if it be regarded as having been given not upon the claim but upon its evidence, as counsel contend. It may, therefore, not only escape the defect that was held fatal to the lien asserted in *Nutt* v. *Knut*, but may claim the support of *McGowan* v. *Parish*, 237 U. S. 285.

We, however, need not dwell upon the distinctions (their soundness may be disputed) nor upon the contentions based upon them, because, as we have said, we consider the other proposition, that is, the power of Congress over the appropriated money and the limitation of payment out of it to an agent or attorney to 20% of the claim, to be the decisive one.

In its discussion counsel for Calhoun have gone far afield and have invoked many propositions of broad generality—have even adduced as impliedly against the power, if we understand counsel, the constitution of the Court of Claims and its jurisdiction as weight in the same direction.

We can only instance some of the points of the argument. The Act of February 26, 1853, c. 80, 10 Stat. 161, now § 823, Rev. Stats., is cited as recognizing the right of attorneys to compensation for their services in claims against the United States, and it is said that contracts for such compensation have been universally sanctioned as legal. And, further, official statements are adduced to the effect that the Court of Claims is so constituted "that the successful prosecution of a claim" in it "is something more than a merely perfunctory performance on part of

counsel"; it is "a matter of great business hazard and risk to counsel when done upon purely contingent fees." And in many cases, it is further urged, no other than contingent fees are possible and to deny them is practically to deny the right to counsel. Mr. Justice Miller is quoted from, in *Taylor* v. *Bemiss*, 110 U. S. 42, in illustration of such result and its injury.

The right to counsel being thus recognized, and recognized antecedently to the contract now involved, it became, counsel contend, a "pre-existing valid right," and to take it away is to divest the right—to take it away is to deprive of property of value assured of protection by the Constitution of the United States. To sustain the contentions a number of state cases are cited. Among them is *Black* v. *O'Hara, Admr.*, 175 Kentucky, 623, the case which the Court of Appeals regarded as authority for its ruling in the present case.

In a general sense there is force and much appeal in the contentions, but we think they carry us into considerations beyond our cognizance. Liberty in any of its exertions and its protection by the Constitution are of concern. The right to bind by contract and require performance of the contract are examples of that liberty and that protection and they might have resistless force against any interfering or impairing legislation if the contest in the case was simply one between Calhoun and the Arnold estate. But there are other elements to be considered—there is the element of the condition Congress imposed on the subject-matter of the controversy regarded as a condition of its grant. Relief could only be had through legislation. This was petitioned and the Senate of the United States was prompted to refer the claim to the Court of Claims. A defect of remedy remained even after the court had been thus invoked and had reported the amount and facts of the claim. Further legislation was necessary, but it could not have been compelled; it

was optional, not compulsory; and it would seem to require no argument to convince that the terms of its enactment must be taken as expressed and the relief it granted accepted with the condition imposed upon it. Indeed, the proposition is confused by its discussion. And it is certainly difficult to deal with the distinction that counsel make between preëxisting and prospective transactions. The right is absolute and universal and necessarily must be to have any strength at all. It is only arbitrary in the sense that many of the faculties of government are. And we have seen there was exertion of one of its powers in the present case—not, however, to interfere with or lessen the asserted obligation of the contract between Arnold and Calhoun, but to limit only the application of the money gratuitously appropriated in the payment of attorneys' fees. The contention is that this cannot be done, or, to put it another way, that the appropriation, though it could not be compelled, was yet subservient to the contract of Calhoun (and, we may interject, if for 50%, for any per cent. or terms) and that he was entitled to all the contract provided, denuded of the condition imposed upon the appropriation.

The contention has no legal basis, and it may be said it has no equitable one. Neither the justice nor the policy of what sovereignty may do or omit to do can be judged from partial views or particular instances. It is easy to conceive what difficulties beset and what circumstances had to be considered in legislating upon such claims. Definite dispositions were matters of reflection and, it may be, experience—imposition was to be protected against as well as just claims provided for, and, considering claimants and their attorneys in the circumstances, it may have seemed to Congress that the limitation imposed was fully justified, that 20% of the amounts appropriated would be a proper adjustment between them. We are not concerned, however, to accuse or defend. Whatever might have been

the moving considerations, the power exercised must be sustained. *Frisbie* v. *United States*, 157 U. S. 160; *Ball* v. *Halsell*, 161 U. S. 72.

The first case dealt with conditions upon pension legislation; the second concerned a claim against the United States on account of Indian depredations. It is, therefore, contended that they are unlike Calhoun's contract with Arnold and that their principle is not applicable. We think otherwise. The legislation passed on was sustained as within the power of government.

We conclude, therefore, that Calhoun's claim for a balance due as fees cannot be paid out of the moneys appropriated by Congress and now in the hands of the administrator *de bonis non*, or recognized as having any validity as against that fund. Beyond this we need not go.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE HOLMES concurs in the result.

MR. JUSTICE MCREYNOLDS took no part in the decision.

DANA, INDIVIDUALLY, *v.* DANA, EXECUTOR OF DANA, ET AL.

ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

No. 276. Argued March 24, 1919.—Decided June 2, 1919.

A judgment holding certain shares of such a character as to come within the general succession tax of the State, though the tax was opposed as reaching real property outside of the State, *held* not to involve the validity of the tax statute or of an authority exercised under the State, and hence not to be reviewable by writ of error under Jud. Code, § 237, as amended in 1916.

Writ of error to review 227 Massachusetts, 562, dismissed.

THE case is stated in the opinion.

Mr. Hollis R. Bailey for plaintiff in error.

Mr. William Harold Hitchcock, Assistant Attorney General of the Commonwealth of Massachusetts, with whom *Mr. Henry C. Attwill*, Attorney General of the Commonwealth of Massachusetts, was on the brief, for defendants in error.

MR. JUSTICE DAY delivered the memorandum opinion of the court.

This is a writ of error seeking to review in this court a decree of the Supreme Judicial Court of Massachusetts. The controversy concerned the right to tax under the Massachusetts Statutes of 1909, c. 490, Part IV, § 1, as amended by Stats. 1912, c. 678, the passing of certain interests under the will of Edith L. Dana, in the Duluth and Gladstone Real Estate Trust, in thirty preferred shares, forty-five common shares of the Amoskeag Manufacturing Company and in one hundred and thirty shares of the Boston Ground Rent Trust.

The probate court held in favor of the Treasurer and Receiver General,—that all of the interests of the testatrix in the several trusts and companies named were taxable under the Massachusetts statute. The case was decided in the Supreme Judicial Court of Massachusetts on June 29, 1917, and final decree entered July 23, 1917. 227 Massachusetts, 562. The ground upon which it is sought to bring the case here on writ of error rests upon the assertion that the Supreme Judicial Court erred in sustaining the succession tax because it was imposed on or on account of real estate situated outside of Massachusetts; therefore, rendering the assessment of the tax a violation of rights secured by the Fourteenth Amendment to

the Constitution of the United States, in that it took the property of the plaintiff in error without due process of law.

The case was decided, and the decree entered in the Supreme Judicial Court since the passage of the Act of September 6, 1916, c. 448, 39 Stat. 726, amending § 237 of the Judicial Code. Since the passage of the amendment, cases brought within its effect, of the character of this one, cannot be brought here by writ of error unless there is drawn in question the validity of a statute of or an authority exercised under the State on the ground of their being repugnant to the Federal Constitution, treaties or laws. Other cases of alleged denial of federal rights, as specified in the statute, can be reviewed in this court only upon writ of certiorari.

An examination of the record in the case and the opinion of the Supreme Judicial Court, shows that neither the validity of the statute, nor the validity of any authority exercised under the State was drawn in question. The case was decided on the view which the Supreme Judicial Court entertained of the character of the property involved, and neither in the record nor in the opinion of the court does it appear that any question was raised or decided which involved the validity of the statute of the State, or of an authority exercised under the State, on the ground of their repugnancy to the Constitution, treaties, or laws of the United States. It follows that the only right of review in this court of the decree of the Supreme Judicial Court of Massachusetts was by writ of certiorari. It is only necessary to refer to our decisions construing the amendment of September 6, 1916. *Philadelphia & Reading Coal & Iron Co.* v. *Gilbert*, 245 U. S. 162; *Ireland* v. *Woods*, 246 U. S. 323; *Stadelman* v. *Miner*, 246 U. S. 544; *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477, 481.

The writ of error must be dismissed for want of jurisdiction.

Dismissed.

FLANDERS, AS TRUSTEE OF COLEMAN, v. COLEMAN.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

No. 419. Argued April 14, 15, 1919.—Decided June 2, 1919.

In a suit by a trustee in bankruptcy to set aside preferences and transfers, the jurisdiction of the District Court depends upon the allegations of the bill and not on the proof in support of them; and, where the bill makes a substantial case within the jurisdiction, the court must determine the merits. P. 227.

Under the Bankruptcy Act, as amended in 1903 and 1910, the District Court has jurisdiction of a suit brought by the trustee against a third party without his consent, to set aside preferences, under § 60b, and transfers under §§ 67e and 70e. *Id.*

Whether an alleged surrender of real property and delivery of rent notes amounted to conveyances under the state law, *held* matters appertaining to the merits and not to be considered on direct appeal under § 238 of the Judicial Code. P. 229.

249 Fed. Rep. 757, reversed.

THE case is stated in the opinion.

Mr. Frederick T. Saussy, with whom *Mr. A. S. Bradley* was on the briefs, for appellant.

Mr. F. H. Saffold for appellee.

MR. JUSTICE DAY delivered the opinion of the court.

This case is here (Judicial Code, § 238) solely upon a question of the jurisdiction of the District Court of the United States for the Southern District of Georgia to entertain the suit brought by R. A. Flanders, as Trustee in Bankruptcy of M. C. Coleman, against E. J. Coleman.

Omitting unnecessary parts, the bills avers: That the jurisdiction of the court is invoked under §§ 60b, 67e and 70e of the Bankruptcy Act, as amended. That in 1902 the said E. J. Coleman, the father of M. C. Coleman, owned a tract of land containing 377 acres in the State of Georgia, and placed his son, M. C. Coleman, the bankrupt, in possession thereof, expressing the intention to give the land to his son. M. C. Coleman cleared the land, moved on the same and lived thereon for a period of at least twelve years, and placed valuable improvements thereon. That M. C. Coleman rented as landlord said 377 acres to Dan Davis, rent notes of $1,000 each for the same being taken in the name of M. C. Coleman, payable on October 1st, 1914, 1915, 1916, 1917, 1918, respectively. That M. C. Coleman collected the note maturing October 1, 1914, and that he became insolvent on December 1, 1914, and ever since that date, up to the time petition was filed, was insolvent within the meaning and intent of the Bankruptcy Act. That while so insolvent, in January or February, 1915, M. C. Coleman turned over to E. J. Coleman four of said rent notes of the value of $4,000, with the intent to hinder, delay, and defraud his creditors. That if the conveyance of the said rent notes was not made with the purpose to hinder, delay and defraud creditors, the transfer had the effect to create a preference in favor of E. J. Coleman, in that when the same was made M. C. Coleman was insolvent, and the collection thereof would enable E. J. Coleman to obtain a greater percentage of any indebtedness claimed to be owing to him by M. C. Coleman, than any other of such creditors of M. C. Coleman, of the same class. That said transfer was within four months from the filing of the petition in bankruptcy, the bankrupt was insolvent, and the transfer operated as a preference, and E. J. Coleman at the time of receiving the same had reasonable cause to believe that the same would effect a preference. That M. C. Coleman, up to December 1,

1914, had a good title to the said 377 acres of land, although it does not appear that a deed had ever been delivered from E. J. Coleman to M. C. Coleman. That E. J. Coleman placed M. C. Coleman in possession of the said land with the intention to give it to him, and the latter held possession of it as his own, and made improvements on it of great value, and dealt with the land as his own for the purpose of obtaining credit, and from said long possession the title to the land became vested in M. C. Coleman. That at the time of the transfer of the rent notes to E. J. Coleman the legal title or right to the land was completely vested in M. C. Coleman as if he had obtained a deed from E. J. Coleman. The complaint adds a description of the improvements, a house, etc., adding, it is averred, $6,400 to the value of the premises. That M. C. Coleman, by agreeing with E. J. Coleman to relinquish his rights and title to the real estate and improvements, in the year 1915, did so with intent to hinder, delay and defraud his creditors. The petition prays that the transfer of the four rent notes be declared void as being made with the intent to hinder, delay and defraud the creditors of M. C. Coleman. That the transfer of the notes be declared to be a preference, should the court hold or find that there is any indebtedness owing to E. J. Coleman by M. C. Coleman. That the notes collected by E. J. Coleman be accounted for. That any of said notes which may not have been collected, be decreed to be surrendered to petitioner. That the 377 acres of land be declared to be the property of the petitioner as trustee in bankruptcy for the purpose of applying the same to the credit of the creditors of the bankrupt. That in the event that the court should hold that the complainant should not have and receive the relief prayed for because of any defect in complainant's claim of title, that he be declared as such trustee to have an equitable lien or charge on the said land, at least to the extent of the value of the improvements. That the said

E. J. Coleman be required to specifically perform his promise and agreement to convey title to the land to M. C. Coleman, and the title be made in the petitioner's name as trustee for the benefit of the creditors of the bankrupt. Afterwards the complainant filed an amendment to the bill in which it was alleged: That within the period of four months immediately preceding the filing of the bankruptcy proceedings by M. C. Coleman, to wit: in January, 1915, while insolvent, and with intent to hinder, delay and defraud his creditors, the said M. C. Coleman, who then held the title to the above described real estate, fraudulently disclaimed such title, and surrendered possession thereof to E. J. Coleman, and thereby fraudulently transferred his rights, title, interests and equity in said real estate to E. J. Coleman, and transferred said rent notes with the purpose and intent to make the tenant the tenant of the respondent, and as such he has attorned.

An answer was filed taking issue upon the allegations of the bill as to fraudulent transfers and conveyance, and making other allegations unnecessary to set out in detail. The cause was referred to a master, who took the evidence, and found that the District Court had jurisdiction, and that there was a fraudulent transfer, and advised a judgment in favor of the trustee. After considering the report of the master, the District Court made a final decree, finding: That, assuming, for the purpose of the consideration of the question of jurisdiction, the testimony submitted by the complainant to be true, the court was without jurisdiction to make a decision on the merits of the controversy. And it was ordered and directed that the bill of complaint be dismissed without prejudice of the petitioner's right to maintain his action in a state court. The District Court also made a certificate stating: That the decree of dismissal was based solely upon the ground that the court was of opinion that it had no jurisdiction to

grant any relief to the complainant, that, in reaching this determination, the court had considered the evidence of the complainant, assuming it to be true for that purpose, only, and that it did not show such a transfer within the meaning of the laws of Congress relating to bankruptcy as would give the court jurisdiction of the proceedings.

Whether the District Court has jurisdiction to grant any relief must be determined upon a consideration of the allegations of the bill and the amendment thereto. If there be enough of substance in them to require the court to hear and determine the cause, then jurisdiction should have been entertained. Looking to the allegations of the bill and the amendment, as we have stated them, it appears that the trustee invoked the aid of § 60b of the Bankruptcy Act, 32 Stat. 799, relating to preferential transfers made within four months before the filing of the petition in bankruptcy, also § 67e, 30 Stat. 564, making fraudulent transfers within four months null and void, except as to persons acting in good faith, or for a present, fair consideration, and of § 70e of the act, 30 Stat. 566, providing that the trustee may avoid any transfer of the bankrupt's property that any creditor might have avoided, and may recover the property, so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder prior to the adjudication.

Since the amendments to the Bankruptcy Act of 1903 and 1910 (32 Stat. 797; 36 Stat. 838) the District Courts of the United States are given concurrent jurisdiction with the state courts to set aside preferences under § 60b of the act, and fraudulent transfers within four months prior to the filing of the petition, under § 67e of the act, and transfers under § 70e making void any transfer by the bankrupt of his property which any creditor might have avoided, and giving the trustee the right to recover the same. See *Stellwagen* v. *Clum*, 245 U. S. 605, 614; *Collett* v. *Adams*, 249 U. S. 545.

The opinion of the District Court, as set forth in the record, shows that its conclusion that there was no jurisdiction was based upon a consideration of the evidence, from which it was found that no preference was shown under § 60b, nor any fraudulent transfer under §§ 67e or 70e. To justify its conclusion that it was without jurisdiction the district judge cites certain decisions of this court: *Bardes* v. *Hawarden Bank*, 178 U. S. 524, in which this court held that under § 23 of the Bankruptcy Act the District Court could by the consent of the defendant, and not otherwise, entertain suits by the trustee against third persons to recover property conveyed by the bankrupt before the institution of the bankruptcy proceedings. It is sufficient to say of that case that it was decided under the terms of the act before the amendments of 1903 and 1910, respectively, to which we have referred, and which give concurrent jurisdiction to the state and federal courts. The District Court also cited *Harris* v. *First National Bank of Mt. Pleasant*, 216 U. S. 382, wherein no transfer of the bankrupt's property was alleged in the petition. The suit was one by the trustee to recover securities of the bankrupt, alleged to be held by the bank for the security of an overdraft which, it was averred, had been paid; and also to recover certain notes alleged to have been paid by the bankrupt.

The opinion of the District Court shows that it really considered the merits of the case in reaching the conclusion that it was without jurisdiction. As this court has not infrequently said, jurisdiction must be determined not upon the conclusion on the merits of the action, but upon consideration of the grounds upon which federal jurisdiction is invoked.

Much of the brief of counsel is taken up with a discussion as to whether the alleged transfers amount to a conveyance under the Georgia statutes and decisions. This discussion is pertinent to the merits, our sole inquiry

concerns the jurisdiction of the court. We are of opinion that there was enough alleged to properly invoke jurisdiction, and that the charges of fraudulent transfers of the rent notes, and of interests in real estate, were sufficiently made to bring the action within the jurisdiction of the District Court under the provisions of the Bankruptcy Act. In this view the judgment of the District Court dismissing the action for want of jurisdiction is

Reversed.

BRAINERD, SHALER & HALL QUARRY COMPANY *v.* BRICE, AS SOLE SURVIVING EXECUTOR OF VAN SCHAICK, ET AL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 431. Submitted March 17, 1919.—Decided June 2, 1919.

The allegations of the complaint determine the character of an action for the purpose of testing the jurisdiction of the District Court to entertain it. P. 231.

The life tenant of a fund, to secure the remaindermen, executed, with surety, a bond running to them, their executors, administrators and assigns, and conditioned for the preservation of the fund by him and payment to them upon his death. One of them assigned part of his remainder interest to a third person, who, after the death of the life tenant, brought an action on the bond against the life tenant's executor and the surety jointly, to recover in the amount of the assigned remainder interest. *Held*, that the assignment of the remainder interest carried with it *pro tanto* the obligation of the bond; and that the action was one prosecuted by an assignee to recover on a chose in action, not cognizable by the District Court, where the assignor and the defendants were citizens of the same State. Jud. Code, § 24. P. 233. *Brown* v. *Fletcher*, 235 U. S. 589, distinguished.

Affirmed.

THE case is stated in the opinion.

Mr. Edwin D. Worcester for plaintiff in error.

Mr. Bronson Winthrop for defendants in error.

MR. JUSTICE DAY delivered the opinion of the court.

The Quarry Company brought an action at law in the District Court of the United States for the Southern District of New York to recover $20,000 and interest from Wilson B. Brice as executor of Henry Van Schaick, deceased, and the American Surety Company. Answers were filed and the case was at issue, and came on for trial, when, upon motion of the defendants, the action was dismissed for want of jurisdiction. The only question here concerns the correctness of this ruling of the District Court. The ground of the dismissal is thus stated in the record:

"In this cause, I hereby certify that this writ of error is allowed solely, and that the order herein dismissing the complaint was based solely, on the ground that no jurisdiction of the District Court existed; that this question has been determined by me on the following grounds:

"This action is brought on a surety bond made by one Henry Van Schaick (since deceased) as principal, and the defendant The American Surety Company of New York, as surety, for the purpose of securing the due payment, at Henry Van Schaick's death, of the remainder-interests in a certain fund of money held by Henry Van Schaick as life tenant; that one Eugene Van Schaick (since deceased) was at the time of the assignment below mentioned the owner of one of the remainder-interests secured by said bond; that Eugene Van Schaick, during the continuance of the life-estate, assigned to the plaintiff a portion of his said remainder-interest, and thereafter survived the said

Henry Van Schaick, and this action is based on such assignment; that Eugene Van Schaick was in his life time a citizen and resident of the State of New York and both of the defendants are citizens and residents of the State of New York; that this suit could not have been prosecuted in this Court upon said remainder-interest and said bond if no such assignment had been made."

Section 24 of the Judicial Code, among other things, provides:

"No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."

To determine the character of the action for the purposes of jurisdiction recourse must be had to the allegations of the complaint. They are quite voluminous, but for our purposes may be summed up as stating: The plaintiff is a corporation of the State of Connecticut, the defendant, the American Surety Company, is a corporation of the State of New York. The defendant, Wilson B. Brice, is a resident and citizen of the State of New York. (It was conceded for the purposes of the motion that Eugene Van Schaick was a citizen of New York.) Jane C. Van Schaick died May 20, 1893, seized of certain real estate in the State of New York. By her last will and testament she gave one-half of her real estate to Henry Van Schaick of New York during his life, with remainder to his descendants who should be living at the time of his decease and living also at the time of the testatrix' decease, if she should survive him. The will was duly probated on June 28, 1893. Henry Van Schaick survived the testatrix, and had living children, one of whom was Eugene

Van Schaick. The complaint then recites certain conveyances, and the prosecution of a partition suit, the decree in which was, by order of the court, considered upon the motion to dismiss. In that suit it was adjudged that Henry Van Schaick had an estate as tenant for life in one-half of the said real estate, that among others Sarah Van Schaick, wife of Eugene Van Schaick, had an estate in remainder in the land to commence in possession upon the death of Henry Van Schaick. It being found that the land could not be divided, it was ordered sold. The sale for $134,369.74 is recited. One-half of the proceeds $67,184.87, was found to belong to Henry Van Schaick for life, at his death to vest in such descendants of Henry Van Schaick as should be then living, or in such persons as should then be the legal owners of said shares. The decree provided that the fund might be paid to Henry Van Schaick upon his giving security to the remaindermen, and provision was made for giving the bond now sued upon. Henry Van Schaick as principal and the American Surety Company then executed the bond in the sum of $75,000. The obligees of the bond were the descendants of Henry Van Schaick living at the time of his death, the amount to be paid to them, their executors, administrators or assigns. The condition of the bond was that Henry Van Schaick during his lifetime should safely keep and preserve said principal sum, and the same should be paid over to his descendants as provided in the decree. Eugene Van Schaick acquired the interest which had been assigned to his wife. On May 9, 1901, Eugene Van Schaick assigned to the Quarry Company the sum of $20,000, to be paid out of his remainder interest. Henry Van Schaick died on November 15, 1914, leaving Eugene Van Schaick and others surviving him. Eugene Van Schaick died on January 27, 1916. Henry Van Schaick did not keep and preserve the principal of said $67,184.87, the same was not paid as provided in the decree, but was lost by said Henry

Van Schaick. The complaint avers demand of the $20,000 and interest, and prays judgment against the defendants.

The action thus appears to have been brought upon the assignment of Eugene Van Schaick, a citizen of New York, to the plaintiff, a corporation of Connecticut, against defendants, who were residents and citizens of New York. Eugene Van Schaick could not have maintained the suit in the federal court, being himself a citizen and resident of New York. This suit was an action at law upon the bond. It was against both the executor and the surety company. The surety company was liable at law only upon the bond. The complaint, fairly considered, shows that such was the real nature of the suit. It contained but a single cause of action, and prayed for joint judgment against the executor of Henry Van Schaick and the surety company. Henry Van Schaick was liable to Eugene Van Schaick upon the bond. Eugene Van Schaick assigned that obligation to the plaintiff to the extent of $20,000. That assignment carried with it the obligation of the surety company given to secure the faithful performance of the duty required of Henry Van Schaick. *George* v. *Tate*, 102 U. S. 564, 571.

The defenses, if any, of the surety company against the claim in the hands of Eugene Van Schaick could have been urged against the plaintiff. We think the plaintiff was an assignee within the meaning of § 24, without formal assignment of the bond. *Shoecraft* v. *Bloxham*, 124 U. S. 730; *Plant Investment Co.* v. *Jacksonville, Tampa & Key West Ry. Co.*, 152 U. S. 71.

Brown v. *Fletcher*, 235 U. S. 589, is an entirely different suit from the one now under consideration. In that action there was an assignment of an interest in a trust estate by the beneficiary, who was a resident and citizen of New York, to the complainants who were residents and citizens of Pennsylvania, and suit was brought in the District Court of the United States for the Southern District of

New York, the defendants being residents and citizens of New York. It was held that the suit to recover this interest in a trust estate was not a suit by an assignee within the meaning of § 24 of the Judicial Code. That suit, this court held, was not a suit upon a chose in action, but was one to recover upon the conveyance of an alienable interest acquired from the owner in a trust estate. Such interests might be sued for in the federal courts when the requisite amount and diversity of citizenship exist. 235 U. S. 598, 599. But here the case is different; the suit was upon the bond, the right to recover arising from the assignment of the interest of Eugene Van Schaick in the fund in the hands of Henry Van Schaick. It was not a suit to recover the interest of Eugene Van Schaick in the estate because of the wrongful conversion thereof by Henry Van Schaick. To such a suit the surety company would not be a proper party. It was, as we have stated, an action upon a single cause of action against the executor of the principal and the surety upon the contract evidenced by the bond. The right to such action was derived by assignment from Eugene Van Schaick, a citizen and resident of New York, and, as he could not have sued in the federal court, his assignee, the plaintiff, could not by reason of § 24 of the Judicial Code.

Affirmed.

Counsel for Parties.

PARKER, PARKER, AS SUPERINTENDENT FOR THE FIVE CIVILIZED TRIBES, ET AL. *v.* RICHARD ET AL., CO-ADMINISTRATORS OF RICHARD.

APPEALS FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Nos. 313, 563. Argued April 24, 1919.—Decided June 2, 1919.

Under § 9 of the Act of May 27, 1908, c. 199, 35 Stat. 312, providing "that the death of any allottee . . . shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee," lands of a deceased full-blood allottee, descended to a full-blood heir and not conveyed with the approval of such court, are "restricted lands" in the sense of § 2 of the same act, which provides that leases of "restricted lands" for oil, gas or other mining purposes may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by him, and not otherwise. P. 238.

The fact that by the proviso of § 9, *supra*, Congress authorized a state court—practically as a federal agency—to sanction conveyances, does not affect the force and operation of the restrictions while they remain. *Id.*

During the continuance of such restrictions, the duty to protect the interests of the full-blood heir by supervising the collection, care and disbursement of royalties arising from an oil and gas lease made under § 2, remains with the Secretary of the Interior. P. 239.

245 Fed. Rep. 330, reversed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Kearful for appellants.

Mr. Britton H. Tabor and *Mr. James B. Lucas* for appellees.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a suit to enjoin two representatives of the Secretary of the Interior—the Superintendent and the Cashier of the Five Civilized Tribes—from collecting future royalties on an oil and gas lease of land allotted to a Creek Indian and to compel them to surrender royalties already collected. In the District Court there was a decree for the defendants, which the Circuit Court of Appeals reversed, one judge dissenting. 245 Fed. Rep. 330. The District Court then complied with the mandate by entering a decree for the plaintiffs, and this the Circuit Court of Appeals declined to disturb. Appeals from the decisions of the latter bring the case here.

The questions to be considered are whether the land covered by the lease is land from which restrictions on alienation have been removed, and whether the supervisory authority of the Secretary of the Interior over the collection, care and disbursement of the royalties has terminated.

The land was part of the Creek tribal lands and was allotted under the Acts of March 1, 1901, c. 676, 31 Stat. 861, and June 30, 1902, c. 1323, 32 Stat. 500, the allottee being a minor and an enrolled Indian of the full blood. In 1912, while he was yet a minor, the oil and gas lease was given by his guardian, the lease being approved by the court having jurisdiction of his estate and by the Secretary of the Interior. The allottee died in 1916, while still a minor, and left his father, a full-blood Creek Indian, as his only heir. Approximately $280,000 in royalties have accrued under the lease—part before and part since the allottee died. These royalties have been collected by the defendants pursuant to the terms of the lease and the regulations of the Secretary of the Interior and are being

held by them in trust under a provision in the regulations which authorizes them to retain and care for such funds "until such time or times as the payment thereof is considered best for the benefit of said lessor, or his or her heirs." The plaintiffs are the administrators of the estate of the deceased allottee.

By § 1 of the Act of May 27, 1908, c. 199, 35 Stat. 312, Congress declared that "all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe." There was no such removal in this instance and it is conceded that at the date of the lease and at the time of allottee's death the alienation of the land was still restricted.

By § 2 of the same act Congress declared that "leases of restricted lands for oil, gas or other mining purposes . . . may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise." The lease was given under this provision and was to run for a term of ten years and as much longer as oil or gas might be found in paying quantity. It provided, conformably to the regulations, that the Secretary of the Interior, through his representatives, should supervise all operations under the lease, that the royalties thereunder should be paid to his representatives, that, with exceptions not material here, the regulations as then or thereafter in force should be deemed part of the lease, and that in the event restrictions on alienation should be removed the

supervision of the Secretary of the Interior over the lease should be relinquished at once and all further royalties thereunder should be paid to the lessor or the then owner of the lands.

One of the regulations prescribed by the Secretary deals with the payment to lessors, their guardians, heirs, etc., of moneys collected as royalties by his representatives and specially authorizes the latter, as before indicated, to withhold such payment in whole or in part for such time as may be in accord with the best interests of the lessor or his heirs. It is under this regulation that the royalties already collected are being retained. The record indicates that a considerable portion of them has been invested in interest-bearing bonds of the United States, but as the propriety of this is not called in question, it may be passed without further notice.

By the Act of 1908, which imposed the restrictions on alienation and contained the leasing provision, Congress further declared, in § 9, "that the death of any allottee . . . shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee." In the absence of the proviso it would be very plain that on the death of the allottee all restrictions on the alienation of the land allotted to him were removed. But the proviso is there and cannot be disregarded. It obviously limits and restrains what precedes it. In exact words it puts full-blood Indian heirs in a distinct and excepted class and forbids any conveyance of any interest of such an heir in such land unless it be approved by the court named. In other words, as to that class of heirs the restrictions are not removed but merely relaxed or qualified to the extent of sanctioning such conveyances as receive the court's approval. Con-

veyances without its approval fall within the ban of the restrictions. That the agency which is to approve or not is a state court is not material. It is the agency selected by Congress and the authority confided to it is to be exercised in giving effect to the will of Congress in respect of a matter within its control. Thus in a practical sense the court in exercising that authority acts as a federal agency; and this is recognized by the Supreme Court of the State. *Marcy* v. *Board of Commissioners*, 45 Oklahoma, 1. Plainly, the restrictions have the same force and operate in the same way as if Congress had selected another agency, exclusively federal, such as the Superintendent of the Five Civilized Tribes.

In cases presenting the question whether lands inherited from allottees by full-blood Indian heirs are freed from restrictions by § 9, and thus brought within another provision in the same act declaring that land "from which restrictions have been or shall be removed" shall be taxable and subject to other civil burdens, the Supreme Court of the State and the federal court of that district have both held that under the proviso such land remains restricted in the hands of the full-blood heirs, and so is not within the taxing provision. *Marcy* v. *Board of Commissioners, supra; United States* v. *Shock*, 187 Fed. Rep. 870.

Entertaining a like view of the proviso, we conclude that the land covered by the lease is still restricted land.

As to the other question this is the situation:

Under the Act of 1908, as already shown, leases of "restricted lands" for oil and gas mining may be made with the approval of the Secretary of the Interior, under regulations prescribed by him, "and not otherwise." The present lease was made and approved under that provision. The land was then restricted and the restrictions have not since been removed. Thus the event which the regulations and the lease declare shall terminate the supervision by the Secretary of the Interior of the

collection, care and disbursement of the royalties has not occurred. Nor has the occasion for some supervision disappeared. The heir is a full-blood Indian, as was the allottee, and is regarded by the act as in need of protection, as was the allottee. In the absence of some provision to the contrary the supervision naturally falls to the Secretary of the Interior. Rev. Stat., §§ 441, 463. *West* v. *Hitchcock*, 205 U. S. 80, 85. And see *Catholic Bishop of Nesqually* v. *Gibbon*, 158 U. S. 155, 166. There is nothing to the contrary in the leasing provision or in any other of which we are aware. True, it is possible under the proviso in § 9 for the heir, if the court approves, to sell and convey his interest in the land. But that has not been done, and it well may be that the heir will remain the owner until the restrictions expire in regular course—April 26, 1931. There is nothing in the proviso indicating that it is intended in the meantime to take from the Secretary or to commit to the court the supervision of matters pertaining to the lease or the royalties. A purpose to do that doubtless would be plainly expressed.

In this situation we think the authority of the Secretary of the Interior to supervise the collection, care and disbursement of the royalties has not terminated.

Criticism is made of some of the regulations, but all that are material here seem to be well within the limits of the Secretary's authority, and the acts of his representatives in respect of the lease and the royalties, so far as questioned here, seem to be well within the regulations.

It results that the original decree in the District Court was right and should stand, and that the second decree in that court and those in the Circuit Court of Appeals must be reversed.

Decrees reversed.

Counsel for Plaintiff in Error.

DENVER & RIO GRANDE RAILROAD COMPANY *v.* CITY AND COUNTY OF DENVER ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

DENVER & RIO GRANDE RAILROAD COMPANY *v.* CITY AND COUNTY OF DENVER ET AL.

ERROR TO THE DISTRICT COURT OF THE CITY AND COUNTY OF DENVER, STATE OF COLORADO.

Nos. 322, 323. Submitted April 23, 1919.—Decided June 2, 1919.

Contract and property rights of a railroad company in respect of the operation of a track in a public street are held subject to the fair exercise by a State, or by a municipality as its agent, of the power to make and enforce regulations reasonably necessary to secure public safety. P. 244.

A track constructed under ordinance grant by a railroad as part of its main line but later used only to serve abutting private industries, traversed a city side street and crossed a thoroughfare used daily by thousands of people in approaching and leaving the Union Depot, which was very near the intersection. *Held*, that an ordinance of the city requiring removal of the track where it crossed the thoroughfare, for the safety of the public, did not violate the rights of the railroad under the contract and due process clauses, it appearing that use of the track could still be maintained through connections with the yards of its owner and of another company, and that resulting expense and loss of revenue would be relatively small. P. 245.

An ordinance which makes no discrimination against interstate commerce, and affects it only incidentally and indirectly, is not objectionable under the commerce clause. P. 246.

167 Pac. Rep. 969, affirmed.

THE case is stated in the opinion.

Mr. E. N. Clark for plaintiff in error. *Mr. J. G. McMurry* was on the briefs.

Mr. James A. Marsh and *Mr. Norton Montgomery* for defendants in error. *Mr. J. J. Lieberman* was on the briefs.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a suit to enjoin the enforcement of an ordinance directing the removal of a railroad track from the intersection of two streets in Denver. On the hearing the plaintiff prevailed, but this was reversed by the Supreme Court of the State with a direction to dismiss the complaint, 167 Pac. Rep. 969, and the direction was followed. The case is here on two writs of error when one would suffice.

The ordinance is assailed as contravening the contract and commerce clauses of the Constitution and the due process clause of the Fourteenth Amendment.

In 1881 a union depot with appurtenant tracks was established in Denver, the streets and alleys within the grounds thus occupied being vacated by the city; and since then all railroads entering the city have used this depot and its tracks. Wynkoop Street is outside the depot grounds and extends east and west along their south line. The depot faces that street and is but a short distance from it. On the other side of the depot are the depot tracks. These connect on the west with several railroad yards including that of the Rio Grande Company, and on the east with other railroad yards, including that of the Union Pacific Company. Wynkoop Street is intersected just opposite the entrance to the depot by Seventeenth Street, which extends northward through the city and is one of its main thoroughfares. Persons and vehicles approaching or leaving the depot pass over this intersection, the number doing so each day being approximately two thousand.

The plaintiff, the Rio Grande Company, has a track in Wynkoop Street from Nineteenth Street to Fourteenth Street. At its eastern terminus—near Nineteenth Street—this track meets a track of the Union Pacific Company which is connected with the yard of that company, and at Fourteenth Street it curves and leads to the Rio Grande Company's yard. Originally it was part of the Rio Grande Company's main line, but since 1881, when the union depot was established, it has been used only as a side track in serving industries on the south side of Wynkoop Street.

The ordinance assailed directs the removal of so much of this track as lies within the intersection of Wynkoop and Seventeeth Streets, that is to say, the portion over which persons and vehicles pass in moving to and from the union depot; and a preamble recites that the use of that portion of the track impedes public travel, affects the safety of persons approaching or leaving the union depot and is no longer essential to the Rio Grande Company.

The Union Pacific Company has a track in the same intersection which the ordinance deals with in the same way, but that company apparently is not complaining.

If the ordinance is enforced the Rio Grande Company can reach the industries on its track in Wynkoop Street between Seventeenth and Nineteenth Streets only through the tracks of the union depot and the Union Pacific. Because of this it will be subjected to some expense and delay not heretofore attending that service, and it also will be prevented from switching cars to and from those industries for other railroads and thereby will lose some revenue. But, according to the record, the loss in expense and otherwise incident to these disadvantages will be relatively small.

The track in Wynkoop Street has been there since 1871, and we shall assume, as did the Supreme Court of the State, that it was put there in virtue of some ordinance of

that period, and that the ordinance became a contract and the right granted became a vested property right. But, as this court often has held, such contracts and rights are held subject to the fair exercise by the State, or the municipality as its agent, of the power to adopt and enforce such regulations as are reasonably necessary to secure the public safety; for this power "is inalienable even by express grant" and its legitimate exertion contravenes neither the contract clause of the Constitution nor the due process clause of the Fourteenth Amendment. *Atlantic Coast Line R. R. Co.* v. *Goldsboro*, 232 U. S. 548, 558; *Chicago & Alton R. R. Co.* v. *Tranbarger*, 238 U. S. 67, 76. Of course, all regulations of this class are subject to judicial scrutiny and where they are found to be plainly unreasonable and arbitrary must be pronounced invalid as transcending that power and falling within the condemnation of one or both, as the case may be, of those constitutional restrictions.

The scope of the power and instances of its application are shown in the decisions sustaining regulations (a) requiring railroad companies at their own expense to abrogate grade crossings by elevating or depressing their tracks and putting in bridges or viaducts at public crossings, *Northern Pacific Ry. Co.* v. *Duluth*, 208 U. S. 583; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minneapolis*, 232 U. S. 430; *Missouri Pacific Ry. Co.* v. *Omaha*, 235 U. S. 121; (b) requiring a railroad company at its own cost to change the location of a track and also to elevate it as a means of making travel on a highway safe, *New York & New England R. R. Co.* v. *Bristol*, 151 U. S. 556; (c) prohibiting a railroad company from laying more than a single track in a narrow busy street although its franchise authorized it to lay a double track there, *Baltimore* v. *Baltimore Trust Co.*, 166 U. S. 673; and (d) requiring a gas company whose mains and pipes were laid beneath the surface of a street under an existing franchise to shift them to another

location at its own cost to make room for a public drainage system, *New Orleans Gas Light Co.* v. *Drainage Commission*, 197 U. S. 453.

Is the ordinance here in question plainly unreasonable and arbitrary? That there is occasion for some real regulation is clear. The crossing is practically in the gateway to the city. Persons in large numbers pass over it every day—many of them unacquainted with the surroundings. Moving engines and cars to and fro over such a place makes it one of danger. Any one of several forms of corrective regulation might be applied. To illustrate: The city might call on the railroad company to construct and maintain a viaduct over the crossing or a tunnel under it; or might lay on the company the duty of maintaining watchmen or flagmen at the crossing. What it actually does by the ordinance is to call on the company to remove the track from the crossing and avail itself of other accessible and fairly convenient means of getting cars to and from its track east of the crossing. No doubt in this the company will experience some disadvantages, but they will be far less burdensome than would be the construction and maintenance of a viaduct or tunnel, and not much more so than would be the keeping of watchmen or flagmen at the crossing.

The situation is unusual and the ordinance deals with it in a rather practical way. Giving effect to all that appears, we are unable to say that what is required is plainly unreasonable and arbitrary.

Counsel for the company manifest some concern lest the rates for switching cars to and from its track east of the crossing may not be satisfactory, but there hardly can be any real trouble along that line. The rates will be subject to investigation and supervision by public commissions just as are other railroad rates, and possible differences over them will be susceptible of ready adjustment.

The objection that the ordinance offends against the commerce clause of the Constitution is not tenable. The ordinance makes no discrimination against interstate commerce, will not impede its movement in regular course, and will affect it only incidentally and indirectly. *South Covington Ry. Co.* v. *Covington*, 235 U. S. 537, 540; *Sligh* v. *Kirkwood*, 237 U. S. 52, 58, 60. The case of *Kansas City Southern Ry. Co.* v. *Kaw Valley Drainage District*, 233 U. S. 75, obviously is not to the contrary.

Judgment affirmed.

THE LAKE MONROE.[1]

ON PETITION FOR WRITS OF PROHIBITION OR MANDAMUS.

No. 30, Original. Argued April 21, 22, 1919.—Decided June 2, 1919.

Under the Act of June 15, 1917, c. 29, 40 Stat. 182, empowering the President, *inter alia*, to requisition private shipping for use and operation by the United States, permitting the exercise of the power through such agencies as he may determine, and providing that ships so requisitioned shall be managed, operated and disposed of as he may direct; and under the President's order of July 11, 1917, delegating those powers for exercise by the Shipping Board and Emergency Fleet Corporation, a ship in course of construction was requisitioned and completed by the Corporation, documented in the name of the United States, and operated by the Board through the Corporation and a private firm, who, as managing and operating agents of the Board, chartered her to a private company for the coastwise carriage of a private cargo of coal. While so engaged a collision occurred, and the vessel was libeled in the District Court. *Held*, that the District Court had jurisdiction to arrest the vessel, under § 9 of the Shipping Board Act of September 7, 1916, c. 451, 39 Stat. 728, providing that vessels purchased, chartered, or leased by the Board, "while em-

[1] The docket title of this case is: *Ex parte: In the Matter of the United States, Petitioner.*

ployed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein," which provision was reenacted by the Act of July 15, 1918, c. 152, 40 Stat. 900, amending the Shipping Board Act. P. 253.

It is not to be assumed that Congress intended that the power given by the Act of June 15, 1917, *supra*, should be exercised by the President arbitrarily or that the President by his order intended to vest absolute powers in the Shipping Board and Fleet Corporation, subject only to such regulations as he might from time to time prescribe. *Id.*

On the contrary, in view of the establishment of the Board and the Corporation as government agencies, broadly empowered and definitely restricted under the Shipping Act, and of the mention of that act in the Act of June 15, 1917, *supra*, it is to be presumed that Congress at least expected that those agencies would be used under the latter act, and that the President, in employing them thereunder, did so because of those powers and restrictions, already provided. *Id.*

This view is confirmed by the Act of July 15, 1918, *supra*, and the companion measure of July 18, 1918, c. 157, 40 Stat. 913, read with the House and Senate reports accompanying the bills. P. 255.

The words "purchased, chartered, or leased," in § 9, *supra*, of the Shipping Act, cover a contract for the temporary use of a vessel or its services not amounting to a demise, "charter" being employed here in a sense as broad as the definition in the Act of July 18, 1918, *supra*, defining it as "any agreement, contract, lease, or commitment by which the possession or services of a vessel are secured for a period of time, or for one or more voyages, whether or not a demise of the vessel." *Id.*

Construing § 9 of the Shipping Act as a whole, the vessel in this case was employed "solely as a merchant vessel," though assigned to the New England coal trade when the Government was rationing the coal supply of the country as a war measure. P. 256.

Order to show cause discharged.

THE case is stated in the opinion.

Mr. Assistant Attorney General Brown, with whom *Mr. Chas. H. Weston* and *Mr. J. Frank Staley* were on the brief, for the United States.

Mr. Edward E. Blodgett, with whom *Mr. Foye M. Murphy* and *Mr. Albert T. Gould* were on the brief, for respondent.

MR. JUSTICE PITNEY delivered the opinion of the court.

Upon petition of the United States this court granted an order to show cause why a writ of prohibition or mandamus should not be issued in order to prevent the United States District Court for the District of Massachusetts, sitting in admiralty, from directing the seizure, attachment, or arrest of a steam vessel known as the *Lake Monroe*, owned and operated by the Government of the United States, to satisfy a claim of the master and part owner of the American auxiliary fishing schooner *Helena* for damages arising out of a collision between the two vessels which occurred on October 8, 1918, off the coast of Cape Cod.

A libel having been filed in the District Court in behalf of the *Helena* against the *Lake Monroe* to recover damages, and praying that process issue for the seizure and attachment of the steamship, the United States, appearing specially, filed suggestions to the effect that, as the steamer was the property of the United States and in its possession and control, the court was without jurisdiction to enforce claims against her by process.

The essential facts are as follows: The *Lake Monroe*, while in process of construction on the Great Lakes, was requisitioned and completed by the United States Shipping Board Emergency Fleet Corporation, and on completion was delivered to the United States Shipping Board for operation, and thereafter assigned by that board, through the Emergency Fleet Corporation, to the firm of William H. Randall & Company, of Boston, as operating and managing agents, that firm being a copartnership having experience in the operation of privately owned vessels for

commercial purposes. They selected the master and other officers of the vessel, put them in charge of her, and furnished her crew; and thereafter they manned, equipped, and repaired her, collected freight moneys from the consignees, and paid the expenses of manning, equipping, and supplying her, and other running expenses, and for these services they were to be paid by, and were to account for the moneys received by them to, the Emergency Fleet Corporation as the agent of the United States Shipping Board. At the time of the collision the *Lake Monroe* was loaded with coal, and operating under a charter executed by Randall & Company, as agents of the Shipping Board, to the New England Fuel & Transportation Company, a private concern in Boston; the cargo having been purchased from a private owner for private use, and the freight for its carraige paid by the Transportation Company to Randall & Company.

The District Court, conceding that the *Lake Monroe*, being a government-owned vessel, would be exempt from arrest except for the provisions of § 9 of the Shipping Board Act of September 7, 1916, c. 451, 39 Stat. 728, 730, held that, because at the time of the collision she was employed solely as a merchant vessel, by the terms of that section she was subject to arrest on process *in rem* to answer for the collision.

It is the principal contention of the Government that the Shipping Board Act has no application to the *Lake Monroe* because she was requisitioned by the President through the Emergency Fleet Corporation under the authority of other legislation, was documented in the name of the United States, and then employed by the President through the Shipping Board and the Fleet Corporation. This contention renders it necessary to review the several acts of legislation and the executive action that has been had pursuant thereto.

The Act of September 7, 1916, passed before the United

States entered the great war but when our commerce already was feeling the ill effects of the world wide shortage in shipping occasioned by that war, is entitled "An Act To establish a United States Shipping Board for the purpose of encouraging, developing, and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States with its Territories and possessions and with foreign countries; to regulate carriers by water engaged in the foreign and interstate commerce of the United States; and for other purposes." It created a board of five commissioners, and authorized them (§ 5) with the approval of the President, to cause to be constructed and equipped, in American shipyards or elsewhere, or to purchase, lease, or charter "vessels suitable, as far as the commercial requirements of the marine trade of the United States may permit, for use as naval auxiliaries or Army transports, or for other naval or military purposes," and also (§ 7) to charter, lease, or sell to any citizen of the United States, any vessel so purchased or constructed.

The important § 9, in its original form, provided as follows: "Sec. 9. That any vessel purchased, chartered, or leased from the board may be registered or enrolled and licensed, or both registered and enrolled and licensed, as a vessel of the United States and entitled to the benefits and privileges appertaining thereto: *Provided*, That foreign-built vessels admitted to American registry or enrollment and license under this Act, and vessels owned, chartered, or leased by any corporation in which the United States is a stockholder, and vessels sold, leased, or chartered to any person a citizen of the United States, as provided in this Act, may engage in the coastwise trade of the United States. Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. *Such vessels while employed solely*

as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein." There followed prohibitions not necessary now to be particularly considered.

Section 11 authorized the Shipping Board to form one or more corporations under the laws of the District of Columbia for the purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States, the total capital stock not to exceed $50,000,000, and the Board to acquire for and on behalf of the United States not less than a majority of the capital stock. The act contained numerous provisions imposing duties upon common carriers by water, and conferring powers of regulation upon the Shipping Board.

The members of this Board were appointed by the President in December, 1916, and, having been confirmed by the Senate, were formally organized in the following month.

By the time the United States declared war, April 6, 1917, the world's merchant shipping had reached the stage of demoralization. The President, by a proclamation dated February 5, 1917, had declared an emergency, and brought into play the prohibition of one of the clauses of § 9 of the above act, against the sale, lease, or charter to a person not a citizen of the United States or the transfer to a foreign registry or flag of any vessel registered or enrolled and licensed under the laws of the United States.

Soon after the declaration of war the Shipping Board, under authority of § 11 of the above act, caused to be organized (April 16, 1917) under the laws of the District of Columbia a corporation known as the United States Shipping Board Emergency Fleet Corporation, with $50,000,000 of capital stock, all owned by the United

States. It was officered by the commissioners of the Shipping Board and their nominees, and was but an operating agency of that Board.

In this state of affairs, Congress embodied in the Urgent Deficiencies Appropriation Act of June 15, 1917, c. 29, 40 Stat. 182, a clause entitled "Emergency Shipping Fund," which conferred upon the President broad powers of control over contracts for the building, production, or purchase of ships or material, and among others the power "To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship." Another clause declared: "The President may exercise the power and authority hereby vested in him . . . through such agency or agencies as he shall determine from time to time: *Provided*, That all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended. All ships constructed, purchased, or requisitioned under authority herein, or heretofore or hereafter acquired by the United States, shall be managed, operated, and disposed of as the President may direct."

Under this authority the President made an executive order July 11, 1917, directing that the Fleet Corporation should have and exercise all power and authority vested in him by said provision, so far as applicable to the construction of vessels, the purchase or requisitioning of vessels in process of construction, and the completion thereof, and that the Shipping Board should exercise all power and authority vested in him by said provision, so far as applicable to the taking over of title or possession, by purchase or requisition, of constructed vessels or charters therein, and the operation, management and disposition of such vessels, and of all others theretofore or there-

after acquired by the United States, declaring: "The powers herein delegated to the United States Shipping Board may, in the discretion of said Board, be exercised directly by the said Board or by it through the United States Shipping Board Emergency Fleet Corporation, or through any other corporation organized by it for such purpose." It was under the authority thus conferred that the *Lake Monroe* was requisitioned while in process of construction and carried to completion by the Fleet Corporation, and thereafter operated by the Shipping Board through that corporation. She was documented in the name of the United States, and assigned to Randall & Company as operating and managing agents, and at the time of the collision was operating under a charter executed by them as agents of the Shipping Board to a private concern for carrying coal in coastwise commerce.

Reference should be made to two acts, approved respectively July 15 and July 18, 1918, the former an amendment to the Shipping Act of 1916, the latter "An Act to confer on the President power to prescribe charter rates and freight rates and to requisition vessels, and for other purposes." (Cc. 152 and 157, 40 Stat. 900, 913). They were introduced as companion measures, the former as H. R. 12,100, the latter as H. R. 12,099, and proceeded *pari passu* through Congress. The Act of July 15 amended § 9 of the Shipping Act of 1916 with respect to some of its prohibitions, but reënacted almost *verbatim* the part we have quoted from that section. The Act of July 18 begins with some definitions, and among them: "The term 'charter' means any agreement, contract, lease, or commitment by which the possession or services of a vessel are secured for a period of time, or for one or more voyages, whether or not a demise of the vessel."

In view of this legislation we regard the contention of the Government that the Shipping Act of 1916 has no application to the *Lake Monroe* as untenable. The argu-

ment adduced in support of it would cause the restrictive provisions of the Act of 1916 to operate only with respect to vessels constructed or acquired under that particular act and would render the powers conferred upon the Shipping Board and the Fleet Corporation by the executive order of July 11, 1917, absolute powers, subject to no regulation except such as the President might from time to time prescribe.

But at the time of the emergency provision of June 15, 1917, the Shipping Board had been established as a public commission, with broad administrative powers and subject to definite restrictions, and the Fleet Corporation had been created as its agency, financed with public funds. The emergency shipping legislation evidently was enacted in the expectation that the President would employ the Shipping Board and the Fleet Corporation as his agencies to exercise the new powers, for the Fleet Corporation was mentioned in the act, and it was known to be but an arm of the Board. It is not necessary to hold that Congress, while entertaining this expectation, went to the extent of restricting the President to those agencies; but it is not to be believed that they intended he should exercise the powers arbitrarily. And when in fact he designated the Fleet Corporation to exercise those powers so far as they pertained to the construction of vessels and the requisitioning of vessels in process of construction, and the Shipping Board so far as they applied to the operation, management, and disposition of vessels, it is to be presumed that he did so because of the general powers that already had been conferred upon them by law, and because they were subject to the regulatory provisions that Congress had enacted.

The provision of § 9 of the Act of September 7, 1916, that vessels purchased, chartered, or leased from the Shipping Board, while employed solely as merchant vessels, should be subject to all laws, regulations, and liabili-

ties governing merchant vessels, whether the United States were interested therein as owner or otherwise, was a most material restriction, deemed by Congress to be essential to subject them to the same duties and liabilities as privately owned merchant vessels with which they competed.

That Congress considered this provision and the other provisions of the Act of 1916 as having living force and general application after the executive order of July 11, 1917, is manifest from the amendatory Act approved July 15, 1918, while the war was at its height, and treated by Congress as an emergency war measure. See House Rep. 568 and Senate Rep. 536, 65th Cong., 2d sess.; also House Rep. 569 and Senate Rep. 535, same session, relating to the companion measure. These reports and the accompanying bills show that the Shipping Board was understood to be executing all its powers under the regulations prescribed by the Act of 1916.

The Government contends further that § 9 of that act has no application to the present case because liability is imposed thereby only with respect to vessels "purchased, chartered, or leased from" the Shipping Board, and only when "employed solely as merchant vessels"; it being insisted that the *Lake Monroe* does not come within either of these descriptions. The return however, makes it clear that at the time of the collision she was operating under a charter executed by the agents of the Board to a certain coal company; and even were it merely an agreement whereby the shippers paid a stipulated rate per ton for the cargo carried, we think that this would be a charter within the meaning of the Act of 1916. The words "purchased, chartered, or leased" indicate an intent to include a contract for the temporary use of a vessel or its services, not amounting to a demise of the ship; in short, the term "charter" was here employed in a sense as broad as the definition afterwards embodied in the Act of July 18, 1918.

We cannot accede to the suggestion that the *Lake Mon-*

roe was not employed "solely as a merchant vessel" because she was assigned to the New England coal trade, and because at that time the Government, through the Fuel Administration, was rationing the coal supply of the country. The language of § 9 "such vessels while employed solely as merchant vessels" must be read in connection with the phrase "whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein." Her service at the time was purely commercial, and she was subject by the terms of the act to the ordinary liability of a merchant vessel, notwithstanding the indirect interest of the Government in the outcome of her voyage.

We deem it clear, also, that among the liabilities designated by the section is the liability of a merchant vessel to be subjected to judicial process in admiralty for the consequences of a collision.

Order to show cause discharged and petition dismissed.

LINCOLN GAS & ELECTRIC LIGHT COMPANY *v.* CITY OF LINCOLN ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

No. 52. Argued October 5, 8, 1917.—Decided June 2, 1919.

A gas company, pending a suit to declare a rate ordinance confiscatory, put the rate in effect as a test, under a stipulation that such action should not be construed as an acceptance of or compliance with the ordinance or be "shown in evidence or presented to the court in the above entitled cause, or used in any way by either party to influence the action of the court in the disposition of the case." *Held*, that this in effect relieved the defendant from obligation to observe the

effect of the reduced rate or prepare to meet inferences drawn from it, and hence afforded a reason why a petition for leave to file a bill of review in the District Court, based on the test, should not be granted by this court. P. 261.

Further grounds for refusing such leave are found in the delay of the plaintiff in instituting the test and in the fact that the results relied on were offset by an error committed in the plaintiff's favor. P. 262.

The District Court, having acquired jurisdiction through a bill presenting a substantial controversy under the Federal Constitution, has power to dispose of an issue fairly within the pleadings, without passing on its federal aspect, by application of the constitution of the State. P. 263.

In a suit challenging the constitutionality of ordinances fixing gas rates and laying an occupation tax, where the District Court upheld the rates but declared the tax void, and, after an appeal in which the tax ruling was not assigned as error or referred to by this court in its opinion or mandate, the rate, on a further trial, was again sustained and the bill dismissed by a final decree, without further mention of the tax, *held*, that the earlier adjudication was to be taken as a part of the final decree, establishing beyond collateral attack in this court or elsewhere that the tax was void; but that the decree might properly be modified to reiterate such earlier adjudication. *Id.*

In a rate case, involving questions, and much evidence, concerning plant valuation, methods of estimating and applying depreciation charges, working capital, going concern value, rate of return, etc., this court is not called upon to recite the substance of such evidence or review the master's findings made after proper investigation. P. 266.

Eight per cent. being the lowest rate generally sought and obtained upon capital invested in banking, merchandising and other business in the vicinity, and 7 per cent. the legal rate in the State, the court cannot approve a finding that no rate yielding as much as 6 per cent. could be deemed confiscatory in the case of the complaining gas company; nor is the finding justified upon the ground that the company had such a monopoly and guaranty of profits as would permit of such restriction. P. 267.

In the absence of any finding or clear evidence that past earnings, invested in a gas company's business, were excessive, a finding restricting the "going value" on the theory that they were, is erroneous. *Id.*

In such a suit, occupation taxes which have been conclusively adjudged void and have not been paid should not be allowed as operating expenses. P. 267.

Having regard for the entire period under investigation, and in the presence of many doubtful items, this court can not hold the rate ordinance in question void, in the absence of an actual and timely test of its practical operation. *Id.*

The decree dismissing the bill without qualification is so modified as to be expressly without prejudice to the commencement of a new suit, in which complainant may show if it can, as a result of its practical test since May 1, 1915, or upon evidence of values, costs of operation and rates of return upon capital as they stand when such suit is brought and are likely to continue, that the rate in question is confiscatory under the new conditions. P. 268.

The court notices judicially that, principally owing to the war, costs of labor and supplies have advanced greatly since the ordinance was adopted, and largely since the case was last heard in the court below, and that annual returns upon capital and enterprise the world over have materially increased, so that what would have been a proper return for capital in gas plants and other public utilities a few years ago furnishes no safe criterion for the present or the future. *Id.*

Modified and affirmed.

THE case is stated in the opinion.

Mr. Robert Burns and *Mr. Edmund C. Strode*, with whom *Mr. Charles A. Frueauff* and *Mr. Dewey C. Bailey, Jr.*, were on the briefs, for appellant.

Mr. W. M. Morning and *Mr. C. Petrus Peterson* for appellees.

MR. JUSTICE PITNEY delivered the opinion of the court.

This is an appeal from the final decree of the district court dismissing the bill of complaint in a suit brought by the Lincoln Gas and Electric Light Company, a Nebraska corporation, against the City of Lincoln and

its officials praying for an injunction to restrain enforcement of an ordinance of the city adopted November 19, 1906, which had the effect of reducing complainant's charges for gas from $1.20 to $1 per 1,000 cubic feet, and an ordinance adopted December 10, 1906, assessing an annual occupation tax upon gas companies in the city.

The action was instituted in December, 1906, without previous test of the $1 rate, in the then Circuit Court of the United States for the District of Nebraska. Besides grounds not pressed, the rate ordinance was attacked upon the ground that its enforcement would deprive complainant of its property without due process of law, in contravention of the Fourteenth Amendment. The tax ordinance was attacked upon grounds of state law, and also upon the ground that it was violative of the "due process" and "equal protection" clauses of the Fourteenth Amendment. Upon final hearing the court, by decree entered April 6, 1909, dismissed the bill as to the rate ordinance, without prejudice to the commencement of a new action; but decreed that the ordinance levying an occupation tax violated the constitution of Nebraska and was for this reason illegal, and granted a permanent injunction against its enforcement. 182 Fed. Rep. 926.

Upon appeal by complainant to this court it was found that there was a great mass of conflicting evidence relating to the value of complainant's plant, the cost of operation, and the gross and net income; that the case had not been referred to a master, nor had specific findings of fact been made by the court below, but only general conclusions which were found not to be sufficient in view of errors assigned which opened up substantially the entire case. For this reason the decree was reversed and the cause remanded to the district court with directions to refer it to a master with leave to both parties to take additional evidence. A temporary injunction

which had been granted in the court below and continued in force until final decree and afterwards pending the appeal, under a bond conditioned to account for overcharges if the rate ordinance should be sustained, was by the decree of reversal continued in force until final decree in the court below, upon condition that a new bond with sureties were given to account for overcharges to consumers since the original restraining order, in the event the ordinance should be sustained. 223 U. S. 349.

Upon the going down of the mandate, the district court referred the case (July, 1912) to a master, to take the proofs and report his findings of fact and of law. After a full hearing he made an elaborate report (September, 1914) to which complainant filed about 125 exceptions, with a motion to recommit the case to the master for additional findings, which motion was denied. The master found the rate ordinance was not confiscatory, and (differing from the former decision of the circuit court) held that the occupation tax ordinance was valid, and included the tax as an operating expense. Upon the hearing of the exceptions the report of the master was confirmed by the district court, and the bill dismissed as to the rate ordinance, by decree entered September 23, 1915; the judge filing a memorandum to the effect that he did not agree with the master as to the validity of the occupation tax ordinance, but deemed it unnecessary to pass upon this in the decree, since the result reached by the master would only be strengthened by adjudging the tax invalid, while if the judge should agree with the master upon that question he still would confirm the report. In other words, assuming the occupation tax ordinance to be valid, the addition of this tax to the annual outgoes of complainant would still leave the $1 rate compensatory.

Complainant brings the case to this court by appeal, with about 120 assignments of error, one of which is that

the district court erred in not decreeing that the occupation tax ordinance was in violation of the Fourteenth Amendment in that it amounted to a denial of the equal protection of the laws.

Pending the hearing upon the master's report, and on or about May 1, 1915, complainant, notwithstanding the injunction *pendente lite*, put into effect a net rate of $1 per thousand feet for gas, and has maintained it since.

Upon the strength of this test, and before the argument of this the second appeal, complainant presented to us a petition for leave to file a bill of review in the court below upon the ground that, according to the master's findings, complainant, in the year 1907, earned so small a return that the rate ordinance would have been confiscatory upon the valuation as found by him, but for this additional finding: "All human experience has shown that increased consumption follows quickly a reduction in the price of commodities, and the evidence in this case satisfactorily shows that gas is no exception to the rule."

The petition averred that the experience of complainant in an actual test of the reduced rate during a considerable period since May 1, 1915, showed that the view of the master was erroneous, and in fact under actual operating conditions there was no increase of consumption.

The application for leave to file a bill of review will be denied, for the following reasons:

First, because the $1 rate was put into effect pursuant to a written stipulation made between the parties in the cause to the effect that the action of the company in so doing should not be construed as an acceptance of or compliance with the ordinance in controversy, and should not be "shown in evidence or presented to the court in the above entitled cause, or used in any way by either party to influence the action of the court in the disposition of the case." Hence defendant was not called upon

to observe the effect of the reduced rate, or prepare to meet inferences drawn therefrom.

Secondly, because complainant might have made a practical test of the ordinance rate before bringing this suit for an injunction, and certainly ought to have resorted to the test long before it did so. As early as the month of January, 1909, this court, in two notable rate cases, indicated its view of the importance, in any but a very clear case, of subjecting prescribed rates to the test of practical experience before attacking them in the courts. *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 16, 18; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 54. When those decisions were announced this case was pending in the circuit court, and shortly thereafter it was decided adversely to complainant upon the question of the validity of the rate, the *Knoxville* and *Willcox Cases* being cited. 182 Fed. Rep. 926, 929. Then, if not before, complainant might have made a practical test of the sufficiency of the rate, instead of waiting six years longer before doing so. The litigation has been extremely tedious and burdensome to both sides, and it ought now to be brought to a conclusion upon the record as it stands.

And thirdly, the argument based upon the master's finding as to the return that complainant would have earned in the year 1907 under the prescribed rates is vitiated by the fact that he included as an operating expense $4,466, the amount of the estimated occupation tax, which was not paid and (as we shall see) has been conclusively adjudged in this suit to be unenforceable. Eliminating this would increase the net return for the year approximately one per cent. upon the investment.

Coming to the merits, we will deal first with the occupation tax ordinance. This is important not only because considerable sums of unpaid taxes have accumulated pending the litigation, but because of the effect of the tax, if sustained, upon the question of the adequacy of the rate.

The ordinance imposes an occupation tax upon all gas companies manufacturing and furnishing gas to the inhabitants of the City of Lincoln, equivalent to 2½ per cent. of their gross receipts derived from that business. It was attacked in the bill as being "partial, discriminatory, unreasonable and oppressive in this: It imposes upon your orator an onerous tax burden to which the business and occupations of other persons within said city are not subjected;" and the bill alleged among other things that the Lincoln Traction Company held a franchise for furnishing electricity to the public in said city, under which it was supplying light, heat, and power in competition with complainant's gas business, and that the city had not subjected this business of the traction company to any occupation tax; wherefore the ordinance "operates to deprive your orator of the equal protection of the laws, imposes a discriminatory burden upon your orator, . . . and deprives your orator of its franchise rights and privileges and of its properties without due process of law," thus being violative of the due process and equal protection provisions of the Fourteenth Amendment. The circuit court deemed that this raised the question of the invalidity of the ordinance under the uniformity provision of the state constitution, and held it was invalid as being in contravention thereof. 182 Fed. Rep. 926, 927, 929. The city requested a modification of the opinion and decree in this respect, on the ground that the invalidity of the ordinance under the state laws and constitution was not charged in the bill. This application was denied.

Neither the city nor any other defendant appealed from that part of the decree which adjudged the occupation tax ordinance void and granted an injunction against its enforcement. Complainant appealed only from that part which was adverse to it upon the question of the validity of the rate ordinance. None of its assignments

of error touched upon the tax ordinance; but in its brief in this court upon the first appeal complainant declared that its bill had assailed the tax ordinance only upon the ground that it was in violation of the equal protection clause of the Fourteenth Amendment; that the bill was drawn upon the theory that this ordinance, like the rate ordinance, could only be assailed in a court of the United States upon the ground "that it was violative of the Constitution of the United States"; apparently overlooking that, even without diversity of citizenship (and there was none), if the bill presented a substantial controversy under the Constitution of the United States, and the requisite amount was involved, the jurisdiction extended to the determination of all questions, including questions of state law, and irrespective of the disposition made of the federal questions. *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 508. It was said in the brief that the decree of the circuit court against the validity of the occupation tax ordinance was a nullity because the subject-matter was not cognizable in a court of the United States and the issue decided was not tendered by the bill. Upon the ground that the decree might constitute no bar to the collection of the occupation taxes, and the amount of these if collected would reduce complainant's returns and render the rate ordinance if sustained still more burdensome, appellant asked this court to pass upon the validity of the tax ordinance upon the federal grounds asserted in the bill.

Naturally this court ignored the suggestion, its jurisdiction over the question not having been invoked by an appeal, and so it happened that the occupation tax ordinance was not mentioned in the opinion or in the mandate.

There is nothing before us to show what decree, if any, was made by the district court upon the going down of the mandate, beyond a mere order of reference to the

master. The final decree made upon the confirmation of his report says nothing upon the subject of the occupation tax ordinance. Its language is "That the bill of complaint herein, so far as the same relates to the ordinance of the City of Lincoln establishing a rate of charges for gas in said city be, and the same is, hereby dismissed, and the restraining order heretofore granted against the enforcement of said ordinance is hereby dissolved." Upon this record, it is very clear that so much of the decree of the circuit court entered April 6, 1909, as held the occupation tax ordinance void and restrained its enforcement was untouched by the former appeal and unaffected by the subsequent proceedings. The decree now under review does not modify the effect of the former decree upon this subject; hence, the adjudication of the invalidity of the occupation tax ordinance and the award of an injunction to restrain its enforcement are to be taken as a part of the final decree in the cause. We deem it entirely clear, also, that the issue of the validity of that ordinance upon grounds of state law was fairly within the pleadings, and that this part of the decree is impregnable against collateral attack, in this court or elsewhere. This being so, the assignment that the district court erred in its decree of September 23, 1915, in not decreeing that the occupation tax ordinance was in violation of the Fourteenth Amendment because amounting to a denial of the equal protection of the laws, is groundless; there was no occasion for the court to make any decree to that effect, since the matter had been conclusively determined against the validity of this ordinance by the final decree of April 6, 1909, which remained in this respect unappealed from. In order to render the matter free from doubt the decree of September 23, 1915, will now be modified by embodying in it a reiteration of that part of the decree of April 6, 1909, which held the occupation tax ordinance void and restrained its enforcement.

Parenthetically, it may be stated that on March 16, 1908, the city council passed an ordinance imposing a like occupation tax upon corporations selling electricity for light or power purposes, but at the rate of only 2 per cent. of their gross receipts; that on December 13, 1909, both occupation taxes were repealed, and gas and electric companies alike were subjected thereafter to an occupation tax equal to 3 per cent. of their gross receipts; and that in July, 1916, the Supreme Court of Nebraska adjudged the occupation tax ordinance of December 10, 1906, to be invalid, following the decision of the circuit court in this case; and on the same day held that the enforcement against complainant of an occupation tax under the ordinance of December, 1909, must be stayed pending the final determination of the present case. *City of Lincoln* v. *Lincoln Gas & Electric Light Co.*, (two cases), 100 Nebraska, 182, 188.

The attack upon the rate ordinance brings under consideration questions of the valuation of the plant, the proper method of estimating and applying depreciation charges, questions of working capital, going concern value, the propriety of various items of operating expense, the rate of return that reasonably ought to be allowed upon capital invested in a plant and business of this character in Nebraska, and the other questions usual in such cases. The special master conducted a patient and elaborate investigation. An enormous mass of evidence was produced before him, and analyzed in his report. In abridged form, it occupies nearly 2,000 pages of printed transcript in this court, besides numerous tabular exhibits. It would be impossible, within reasonable limits, to recite the substance of the evidence or review the master's findings. We do not feel called upon to do this. *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 17. The findings are subjected to numerous and minute criticisms, and some of these seem to possess

force. We cannot approve the finding that no rate yielding as much as 6 per cent. upon the invested capital could be regarded as confiscatory, in view of the undisputed evidence, accepted by the master, that 8 per cent. was the lowest rate sought and generally obtained as a return upon capital invested in banking, merchandising, and other business in the vicinity; 7 per cent. being the "legal rate" of interest in Nebraska. Complainant had not such a monopoly nor were its profits "virtually guaranteed" in such a sense as to permit the public authorities to restrict it to a return of 6 per cent. upon its invested capital. It is not entirely clear, however, that the rate ordinance did so restrict it. Again, we question the propriety of the master's treatment of "going value," which he seems to have estimated at less than otherwise he would have placed it upon the theory that the company's business had been developed, at the expense of the public, in the expenditure of past earnings exceeding a fair return upon the capital invested, and this without any finding, or any clear evidence to which our attention has been called, that past earnings were excessive. On the other hand, the master erred in favor of complainant by allowing as operating expenses occupation taxes for the years 1907 to 1909, inclusive, these taxes not having been paid and the taxing ordinance applicable to that period having been held invalid by the decree of the circuit court entered April 6, 1909, and so held since his report by the state supreme court. And it is possible he erred in allowing occupation taxes for the year 1910 and subsequent years, since these were not in fact paid. As we have seen, the occupation tax erroneously allowed for the crucial year 1907 amounted to more than 1 per cent. upon the invested capital at the master's valuation. He also appears to have been unduly liberal to the company in the allowance for working capital, and in some other items of valuation, as well as in respect of some

expenditures allowed as operating expense. Without going into details, we content ourselves with announcing our general conclusion that, having regard to the entire period under investigation, we are unable to say that the master erred in holding that the ordinance was not shown to have been confiscatory in its effect. It is probable that in the years 1907 and 1912 the net return was close to the line, if not below it; but that in the other years examined it was at least 7 per cent.; and there are too many doubtful items for us to adjudge the ordinance void, in the absence of an actual and timely test.

The decree dismissed the bill, however, so far as it related to the rate ordinance, without reservation or qualification. Perhaps it would go without saying, but in our opinion the decree ought to be modified so as to permit complainant to make another application to the courts for relief against the operation of the ordinance hereafter, if it can show, as a result of its practical test of the dollar rate since May 1, 1915, or upon evidence respecting values, costs of operation, and the current rates of return upon capital as they stand at the time of bringing suit and are likely to continue thereafter, that the rate ordinance is confiscatory in its effect under the new conditions. It is a matter of common knowledge that, owing principally to the world war, the costs of labor and supplies of every kind have greatly advanced since the ordinance was adopted, and largely since this cause was last heard in the court below. And it is equally well known that annual returns upon capital and enterprise the world over have materially increased, so that what would have been a proper rate of return for capital invested in gas plants and similar public utilities a few years ago furnishes no safe criterion for the present or for the future.

The final decree of September 23, 1915, will be modified by embodying in it a reiteration of that part of the

final decree of April 6, 1909, which held that the ordinance of the City of Lincoln, approved December 10, 1906, levying an occupation tax against complainant, was illegal and void because violative of the constitution of the State of Nebraska, and that the enforcement of the same as to complainant should be perpetually enjoined.

The decree of September 23, 1915, will be further modified so that the dismissal of the bill of complaint, in so far as it relates to the ordinance of the City of Lincoln approved November 19, 1906, establishing a rate of charges for gas in said city, shall be without prejudice to the commencement of a new action to restrain the enforcement of said ordinance hereafter, and

Decree, as thus modified, affirmed with costs.

THE SCOW "6-S." [1]

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 301. Argued April 24, 1919.—Decided June 2, 1919.

The Act of June 29, 1888, c. 496, 25 Stat. 209, as amended, regulating dumping in New York Harbor, renders a vessel employed in violating its provisions directly liable for the same pecuniary penalties that it imposes on individuals, and these may be enforced against the vessel summarily by libel, without awaiting the result of criminal proceedings against the individuals. P. 271. *The Strathairly*, 124 U. S. 558, distinguished.

There is no constitutional or other reason why an unliquidated fine may not be enforced against a vessel in admiralty; and jurisdiction of such a proceeding is conferred upon the District Court by the

[1] The docket title of this case is: *P. Sanford Ross, Inc., Claimant of the Scow "6-S,"* v. *United States.*

Act of 1888, *supra*, whether or not it be regarded as a proceeding for the enforcement of a penalty or forfeiture within § 24 of the Judicial Code. P. 272.

247 Fed. Rep. 348, affirmed.

THE case is stated in the opinion.

Mr. A. Leo Everett for appellant.

Mr. Assistant Attorney General Brown for the United States.

MR. JUSTICE PITNEY delivered the opinion of the court.

This was a libel *in rem*, brought against a scow under the Act of June 29, 1888, c. 496, 25 Stat. 209, as amended August 18, 1894, (c. 299, § 3, 28 Stat. 360), and May 28, 1908, (c. 212, § 8, 35 Stat. 426), for illegal dumping in New York Harbor. Appellant, as claimant of the scow, denied the jurisdiction of the court to entertain the suit: first, on the ground that by the statute the vessel was made liable only for such penalties as might be imposed in criminal proceedings upon the persons responsible for the illegal act, and there had been in this case no conviction of such persons or assessment of penalties; and, secondly, that the assessment of such penalties was not within the admiralty or maritime jurisdiction of the court. A motion to dismiss on this ground was overruled, the court gave judgment against the scow (247 Fed. Rep. 348), and the claimant appeals to this court upon the jurisdictional question under § 238, Judicial Code.

The statute forbids by § 1 the deposit of mud, etc., in the tidal waters of New York Harbor except within limits prescribed by the supervisor, and provides that "every such act is made a misdemeanor, and every person engaged in or who shall aid, abet, authorize, or instigate a violation of this section, shall, upon conviction,

be punishable by a fine or imprisonment, or both, such fine to be not less than two hundred and fifty dollars nor more than two thousand five hundred dollars, and the imprisonment to be not less than thirty days nor more than one year, either or both united, as the judge before whom conviction is obtained shall decide."

Section 2 provides that the master, etc., of any vessel towing a scow loaded with prohibited matter to a place of deposit elsewhere than within the limits shall be punishable as provided in § 1, and in addition have his license revoked or suspended.

Section 4 contains provisions for disposal of dredged material, and a penalty for violation thereof, and concludes as follows: "Any boat or vessel used or employed in violating any provision of this act, shall be liable to the pecuniary penalties imposed thereby, and may be proceeded against, summarily by way of libel in any district court of the United States, having jurisdiction thereof."

The principal contention of appellant is that the purpose of the statute was to make the vessel responsible only for such pecuniary penalties as might be assessed against the offending persons in criminal proceedings, and hence that the conviction and fining of such persons is a condition precedent to the maintenance of a suit against the vessel. In support of this *The Strathairly*, 124 U. S. 558, is cited. That was a suit brought under §§ 4252, 4253, 4255, 4266, and 4270, Rev. Stats., which contained provisions respecting the carriage of passengers on vessels entering or leaving ports of the United States, and prescribed fines and penalties against the master and owner of the vessel violating such provisions. Section 4270 provided: "The amount of the several penalties imposed by the foregoing provisions regulating the carriage of passengers in merchant-vessels shall be liens on the vessel violating those provisions, and such

vessel shall be libeled therefor in any circuit or district court of the United States where such vessel shall arrive." This court said (p. 580) that the penalty recoverable against the vessel, and by § 4270 made a lien upon it, was not an additional penalty, but the same which by § 4253 was to be adjudged against the master in the criminal prosecution.

We concur with the district judge in the view that the case is distinguishable from the present one because of the substantial difference in the applicable provisions of law. The act of Congress here in question imposes a direct liability upon the vessel for the pecuniary penalties prescribed, and declares that it may be proceeded against summarily by libel in any district court of the United States having jurisdiction thereof. This precludes the idea that the proceeding by libel is to be deferred to await the possibly slow course of criminal proceedings against the persons individually responsible. It treats the offending vessel as a guilty thing, upon the familiar principle of the maritime law, and permits a proceeding against her in any court of admiralty "having jurisdiction thereof"—meaning any court within whose jurisdiction she may be found.

Libels of this character, without previous conviction of the responsible persons, have been entertained under this act from the time of its enactment, and dealt with upon the merits, without question as to the jurisdiction until now. *United States* v. *The Sadie*, 41 Fed. Rep. 396; *The G. L. Garlic*, 45 Fed. Rep. 380; *The Anjer Head*, 46 Fed. Rep. 664; *The Bombay*, 46 Fed. Rep. 665; *The Emperor*, 49 Fed. Rep. 751; *United States* v. *Various Tugs and Scows*, 225 Fed. Rep. 505; *The J. Rich Steers*, 228 Fed. Rep. 319; *The Columbia*, 255 Fed. Rep. 515.

There is no difficulty, on constitutional or other grounds, about assessing an unliquidated fine in the admiralty;

and, if it be not a proceeding for enforcement of a penalty or forfeiture incurred under a law of the United States within the meaning of the 9th subdivision of § 24, Judicial Code, the Act of 1888 itself confers jurisdiction.

Judgment affirmed.

BLAIR *v.* UNITED STATES.

TEMPLETON *v.* UNITED STATES.

PHILLIPS *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BLAIR *v.* UNITED STATES ET AL.

TEMPLETON *v.* UNITED STATES ET AL.

PHILLIPS *v.* UNITED STATES ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Nos. 763–768. Argued January 28, 1919.—Decided June 2, 1919.

It is the duty of this court to refrain from passing upon the constitutionality of an act of Congress when the interests of the party attacking it do not entitle him to raise the question. P. 278.

Held, that witnesses subpœnaed in a grand jury investigation of possible violations of the Corrupt Practices Act of June 25, 1910, as amended, and of possible perjury in connection therewith, had no standing to question the power of Congress, under Art. I, § 4, of the Constitution, to enact provisions for regulation and control of primary elections of candidates for the office of United States Senator. P. 279.

Under the Fifth Amendment and the legislation of Congress, a federal

grand jury has a broad power of investigation and inquisition; the scope of its inquiries is not to be narrowly limited by questions of propriety or forecasts of probable results; the examination of witnesses need not be preceded by a formal charge against a particular individual; and witnesses, duly subpœnaed, must attend and answer the questions propounded in the inquiry, subject to the right to be protected from self-incrimination, and excluding matters specially privileged by law. P. 281.

A witness summoned to give testimony before a grand jury in the District Court is not entitled to refuse to answer, when ordered by the court, upon the ground that the court and jury are without jurisdiction over the supposed offense under investigation. P. 282.

253 Fed. Rep. 800, affirmed.

THE cases are stated in the opinion.

Mr. Martin W. Littleton, with whom *Mr. Owen N. Brown* was on the brief, for plaintiffs in error and appellants, in support of the proposition that Congress has no power to regulate and control primary elections for candidates for the office of United States Senator, cited: *United States* v. *Anthony*, 11 Blatchf. 200, 205; *United States* v. *Cruikshank*, 92 U. S. 542; *Minor* v. *Happersett*, 21 Wall. 162; Black, Constitutional Law, 145; *United States* v. *Gradwell*, 243 U. S. 476, 481; *United States* v. *O'Toole*, 236 Fed. Rep. 993; Hamilton, Federalist, Essay 59, p. 448; Luther Martin's "Genuine Information," Farrand's Records of Federal Convention, vol. 3, pp. 194, 195; Rufus King, in Massachusetts Convention, *id.*, p. 267; James Madison, in Virginia Convention, *id.*, pp. 311, 319; William R. Davie, in North Carolina Convention, *id.*, pp. 344, 345; Roger Sherman, in House of Representatives, *id.*, p. 359. Also, *Ledgerwood* v. *Pitts*, 122 Tennessee, 570; *State* v. *Simmons*, 117 Arkansas, 159; *Montgomery* v. *Chelf*, 118 Kentucky, 766; *Hager* v. *Robinson*, 154 Kentucky, 489; *State ex rel. Von Stade* v. *Taylor*, 220 Missouri, 618; *State* v. *Nichols*, 50 Washington, 508; *Gray* v. *Seitz*, 162 Indiana, 1; *Kelso* v. *Cook*,

184 Indiana, 173; *State* v. *Erickson*, 119 Minnesota, 152; *Leu* v. *Montgomery*, 31 N. Dak. 1; *State* v. *Michel*, 121 Louisiana, 374; *Riter* v. *Douglass*, 32 Nevada, 400.

If the Federal Corrupt Practices Act is unconstitutional so far as it relates to primary elections, then neither the United States district court nor the grand jury had jurisdiction to inquire into primary elections, or to indict or try anyone for any offense based on the unconstitutional provisions of the statute, and therefore the order committing appellants is null and void. The federal grand jury is merely an accessory to the criminal jurisdiction of the United States district court, as the power and authority of that court in criminal matters can be exercised only through the instrumentality of the grand jury. See opinion of Chief Justice Marshall, in *United States* v. *Hill*, 1 Brock. 156, 160.

It appears affirmatively from the record in this case that the subject-matter which the grand jury was investigating related to the verification of a financial statement on the subject of primary elections, made pursuant to the requirements of the Corrupt Practices Act—a subject-matter that could not, under any circumstances, constitute a crime cognizable by the United States district court for the Southern District of New York or by any other United States court. The federal grand jury can investigate only crimes cognizable by the United States district court. *Hale* v. *Henkel*, 201 U. S. 43, 65. It could no more investigate perjury committed under such circumstances than it could investigate the crime of murder committed in violation of the laws of the State of New York. The entire proceedings were *coram non judice*. *In re Bonner*, 151 U. S. 242; *People* v. *Knatt*, 156 N. Y. 302, 307; *Norton* v. *Shelby County*, 118 U. S. 425, 442; *Chicago, Indianapolis & L. Ry. Co.* v. *Hackett*, 228 U. S. 560, 566; *Hurtado* v. *California*, 110 U. S. 536; *Huntington* v. *Worthen*, 120 U. S. 101;

Ex parte Siebold, 100 U. S. 371; *In re Sawyer*, 124 U. S. 200; *Holman* v. *Mayor of Austin*, 34 Texas, 668; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 479.

Mr. Assistant Attorney General Porter, with whom *Mr. W. C. Herron* and *Mr. H. S. Ridgely* were on the brief, for the United States.

MR. JUSTICE PITNEY delivered the opinion of the court.

Three of these cases come here on writs of error, the other three on appeals. The writs bring up final orders adjudging plaintiffs in error guilty of contempt of court because of their refusal to obey an order directing them to answer certain questions asked of them before a federal grand jury, and committing them to the custody of the United States marshal until they should comply. The appeals bring under review final orders discharging writs of habeas corpus sued out by appellants to review their detention under the original orders of commitment and remanding them to the custody of the marshal. Blair, Templeton, and Phillips are plaintiffs in error, as well as appellants.

It appears that in October, 1918, the federal grand jury of the Southern District of New York was making inquiry concerning supposed violations of § 125 of the Criminal Code (relating to perjury) and of the so-called Corrupt Practices Act of June 25, 1910, c. 392, 36 Stat. 822, as amended, in connection with the verification and filing in that district of reports to the Secretary of the Senate of the United States made by a candidate for nomination as Senator at a primary election held in the State of Michigan on August 27, 1918. Phillips was served with a subpœna requiring him to appear and testify before this grand jury. Blair and Templeton

were subpœnaed to appear and testify and also to produce certain records, correspondence, and other documentary evidence. All were served in the State of Michigan. They appeared before the grand jury in response to the subpœnas, were severally sworn, and were examined by counsel for the United States. Each witness, after answering preliminary questions, asked that he be informed of the object and purpose of the inquiry and against whom it was directed, whereupon he was informed by counsel for the United States that the inquiry was not directed against him (the witness). After this each witness read to and left with the grand jury a typewritten statement to the effect that upon advice of counsel he refused to answer any questions pertaining to the matter under inquiry, for the reason that the grand jury and the court were without jurisdiction to inquire into the conduct of a campaign in Michigan for the primary election of a United States Senator; that the Federal Corrupt Practices Act as amended was unconstitutional; and that no federal court or grand jury in any State had constitutional authority to conduct an inquiry regarding a primary election for United States Senator. Thereupon each witness was asked by counsel for the United States whether he refused to testify for the reason that to do so would incriminate him, to which he made no other answer than to refer to the reasons for his refusal as set forth in his statement.

The grand jury made a written presentment of these facts to the district court, with a prayer that the parties named might be dealt with as contumacious witnesses.

Upon the coming in of the presentment the witnesses appeared in person and by counsel in opposition to the petition of the grand jury and contended that the Corrupt Practices Act as amended was unconstitutional and void, referring to the opinion of this court in *United States* v. *Gradwell*, 243 U. S. 476, 487. A hearing was had which

went to the merits; the minutes of the grand jury were read and made a part of the presentment; and the matter was fully argued. At the conclusion of the hearing the court directed the witnesses to answer the questions propounded to them before the grand jury. They were again called, were asked the same questions, and again refused to answer for the same reasons before assigned. The grand jury immediately made a further presentment, whereupon the court, after hearing the parties, adjudged appellants guilty of contempt because of their refusal to comply with the order of the court, and remanded them to the custody of the marshal until they should comply.

Being in his custody, each of them presented to the district court a petition for a writ of habeas corpus; the writ was allowed, returnable forthwith; and the United States district attorney, in behalf of the marshal, made a motion to dismiss the writ, in effect a demurrer to the petition for insufficiency. After hearing, the court discharged the writ and remanded each of the petitioners to the custody of the marshal (253 Fed. Rep. 800); and the present writs of error and appeals were allowed.

The principal contention is that the Act of June 25, 1910, c. 392, 36 Stat. 822, and its amendments (Act of August 19, 1911, c. 33, 37 Stat. 25; Act of August 23, 1912, c. 349, 37 Stat. 360) are unconstitutional in so far as they attempt to regulate and control the selection by political parties at primary elections of candidates for United States Senator to be voted for at the general elections; it being insisted that the authority of Congress under § 4 of Art. I of the Constitution extends only to the definitive general election and not to preëlection arrangements or devices such as nominating conventions and primaries.

It is maintained further that, because of the invalidity of these statutes, neither the United States district court

nor the federal grand jury has jurisdiction to inquire into primary elections or to indict or try any person for an offense based upon the statutes, and therefore the order committing appellants is null and void.

The same constitutional question was stirred in *United States* v. *Gradwell*, 243 U. S. 476, 487, but its determination was unnecessary for the decision of the case, and for this reason it was left undetermined, as the opinion states. Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it.

We do not think the present parties are so entitled, since a brief consideration of the relation of a witness to the proceeding in which he is called will suffice to show that he is not interested to challenge the jurisdiction of court or grand jury over the subject-matter that is under inquiry.

Long before the separation of the American Colonies from the mother country, compulsion of witnesses to appear and testify had become established in England. By Act of 5 Eliz., c. 9, § 12 (1562), provision was made for the service of process out of any court of record requiring the person served to testify concerning any cause or matter pending in the court, under a penalty of ten pounds besides damages to be recovered by the party aggrieved. See *Havithbury* v. *Harvey*, Cro. Eliz. 130; 1 Leon. 122; *Goodwin* (or *Goodman*) v. *West*, Cro. Car. 522, 540; March, 18. When it was that grand juries first resorted to compulsory process for witnesses is not clear. But as early as 1612, in the Countess of Shrewsbury's case, Lord Bacon is reported to have declared that "all subjects, without distinction of degrees, owe to the King tribute and service, not only of their deed

and hand, but of their knowledge and discovery." 2 How. St. Tr. 769, 778. And by Act of 7 & 8 Wm. III, c. 3, § 7 (1695), parties indicted for treason or misprision of treason were given the like process to compel their witnesses to appear as was usually granted to compel witnesses to appear against them; clearly evincing that process for crown witnesses was already in familiar use.

At the foundation of our Federal Government the inquisitorial function of the grand jury and the compulsion of witnesses were recognized as incidents of the judicial power of the United States. By the Fifth Amendment a presentment or indictment by grand jury was made essential to hold one to answer for a capital or otherwise infamous crime, and it was declared that no person should be compelled in a criminal case to be a witness against himself; while, by the Sixth Amendment, in all criminal prosecutions the accused was given the right to a speedy and public trial, with compulsory process for obtaining witnesses in his favor. By the first Judiciary Act (September 24, 1789, c. 20, § 30, 1 Stat. 73, 88), the mode of proof by examination of witnesses in the courts of the United States was regulated, and their duty to appear and testify was recognized. These provisions, as modified by subsequent legislation, are found in §§ 861–865, Rev. Stats. By Act of March 2, 1793, c. 22, § 6, 1 Stat. 333, 335, it was enacted that subpœnas for witnesses required to attend a court of the United States in any district might run into any other district, with a proviso limiting the effect of this in civil causes so that witnesses living outside of the district in which the court was held need not attend beyond a limited distance from the place of their residence. See § 876, Rev. Stats. By § 877, originating in Act of February 26, 1853, c. 80, § 3, 10 Stat. 161, 169, witnesses required to attend any term of the district court on the part of the United States may be subpœnaed to attend to testify

generally; and under such process they shall appear before the grand or petit jury, or both, as required by the court or the district attorney. By the same Act of 1853 (10 Stat. 167, 168), fees for the attendance and mileage of witnesses were regulated; and it was provided that where the United States was a party the marshal on the order of the court should pay such fees. Rev. Stats., §§ 848, 855. And §§ 879 and 881, Rev. Stats., contain provisions for requiring witnesses in criminal proceedings to give recognizance for their appearance to testify, and for detaining them in prison in default of such recognizance.

In all of these provisions, as in the general law upon the subject, it is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned, and for performance of which he is entitled to no further compensation than that which the statutes provide. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public. The duty, so onerous at times, yet so necessary to the administration of justice according to the forms and modes established in our system of government (*Wilson* v. *United States*, 221 U. S. 361, 372, quoting Lord Ellenborough), is subject to mitigation in exceptional circumstances; there is a constitutional exemption from being compelled in any criminal case to be a witness against oneself, entitling the witness to be excused from answering anything that will tend to incriminate him (see *Brown* v. *Walker*, 161 U. S. 591); some confidential matters are shielded from considerations of policy, and perhaps in other cases for special reasons a witness may be excused from telling all that he knows.

But, aside from exceptions and qualifications—and

none such is asserted in the present case—the witness is bound not only to attend but to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry.

He is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise, for this is no concern of his. *Nelson* v. *United States*, 201 U. S. 92, 115.

On familiar principles, he is not entitled to challenge the authority of the court or of the grand jury, provided they have a *de facto* existence and organization.

He is not entitled to set limits to the investigation that the grand jury may conduct. The Fifth Amendment and the statutes relative to the organization of grand juries recognize such a jury as being possessed of the same powers that pertained to its British prototype, and in our system examination of witnesses by a grand jury need not be preceded by a formal charge against a particular individual. *Hale* v. *Henkel*, 201 U. S. 43, 65. It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning. *Hendricks* v. *United States*, 223 U. S. 178, 184.

And, for the same reasons, witnesses are not entitled to take exception to the jurisdiction of the grand jury or the court over the particular subject-matter that is under investigation. In truth it is in the ordinary case no concern of one summoned as a witness whether the offense is within the jurisdiction of the court or not. At

least, the court and grand jury have authority and jurisdiction to investigate the facts in order to determine the question whether the facts show a case within their jurisdiction.

The present cases are not exceptional, and for the reasons that have been outlined we are of opinion that appellants were not entitled to raise any question about the constitutionality of the statutes under which the grand jury's investigation was conducted.

Final orders affirmed.

RUMELY v. McCARTHY, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 874. Submitted April 16, 1919.—Decided June 2, 1919.

Under an indictment charging violations of the Trading with the Enemy Act of October 6, 1917, c. 106, 40 Stat. 411, in failing to report enemy property and credits, the contention, raised before a commissioner in removal proceedings and based on the allegations and defendant's uncontradicted evidence, that the report, if required, would show defendant guilty, under the same act, of trading with the enemy, and thus compel him to be a witness against himself, contrary to the Fifth Amendment, is matter for defense at the trial and does not go to the issue of probable cause. P. 287.

A finding of fact made by a commissioner in removal proceedings and supported by competent evidence is not reviewable in *habeas corpus*. P. 289.

The duty, imposed by the Trading with the Enemy Act, § 7a, to make report of enemy property and credits to the Alien Property Custodian, involves the duty to make it at his office, and a wilful failure so to make it is an offense, committed in the district where the office is established. *Id.*

Where defendant was indicted in the Southern District of New York for a conspiracy to omit making such a report and for perjury in verifying a false one, *held*, that it was discretionary with the court of that district, without requiring a statement of reasons from the Government, to order his removal under a later indictment charging failure to make the report in the District of Columbia, and that the discretion was not reviewable by this court in *habeas corpus*. P. 289.
256 Fed. Rep. 565, affirmed.

THE case is stated in the opinion.

Mr. Stephen C. Baldwin for appellant. *Mr. Frederick J. Powell* and *Mr. John M. Lowrie* were on the brief.

Mr. Assistant Attorney General Brown for appellees.

MR. JUSTICE PITNEY delivered the opinion of the court.

This is an appeal from a final order of the District Court for the Southern District of New York dismissing writs of habeas corpus and certiorari sued out by appellant to determine the legality of his detention under a commitment issued by appellee Hitchcock, as United States Commissioner, to hold appellant in the custody of the United States Marshal pending the issuance of a warrant for his removal to the District of Columbia to answer an indictment returned against him by the grand jury of that District for an alleged violation of the Act of Congress of October 6, 1917, c. 106, 40 Stat. 411, known as the Trading with the Enemy Act.

This indictment, described as the "Washington indictment," contains two counts, each of which recites the existence, at the time of the offense charged, of a state of war between the United States and the Imperial German Government, and sets out that the Act of October 6, 1917, was in force, and that the Alien Property Custodian, an officer of the United States appointed

under authority of that act, had his office for the transaction of official business in the District of Columbia and at no other place. In the first count it is recited that the statute made it the duty of any person in the United States having custody or control of any property of or on behalf of an enemy of the United States to report the fact to the Alien Property Custodian within a period said to have expired December 20, 1917; and it is alleged that on October 6, 1917, and on each day thereafter down to and including the date of the indictment (December 2, 1918) appellant had the custody and control of certain property in the United States, that is to say, certain capital stock of the S. S. McClure Newspaper Corporation, a corporation of the State of New York, which, as appellant knew, belonged to the Imperial German Government; and that appellant "at the District of Columbia, and within the jurisdiction of this court" willfully failed, neglected, and omitted to report that fact to the Alien Property Custodian within the period prescribed by law and continuously down to and including the date of the indictment. The second count, in addition to the matter already stated, recites the provision of the act which made it the duty of any person in the United States indebted to an enemy of the United States to report the fact to the Custodian within a period prescribed; and avers that on October 6, 1917, and on each day thereafter down to, etc., appellant, then being within the United States, was indebted in the sum of $1,451,700 to the Imperial German Government as he well knew, and being so indebted "at the District of Columbia, and within the jurisdiction of this court" willfully failed, neglected and omitted to report the fact of such indebtedness to the Custodian.

Previous to the Washington indictment two indictments had been returned by the United States grand jury for the Southern District of New York, upon which

appellant was on bail awaiting trial. These were found August 2, 1918; one of them being against appellant alone and charging perjury in a report made by him December 4, 1917, to the Alien Property Custodian, in that, being required to state the property held by him for alien enemies and indebtedness owed by him to alien enemies, he swore that the only item in this category was a note for $100,000 made by him and payable to one Herman Sielcken, whereas it was alleged he was not indebted to Sielcken but was indebted to the Imperial German Government in the sum of $1,301,700, and held and had control of certain property belonging to that government, consisting of shares of the capital stock of the S. S. McClure Newspaper Corporation, a corporation of the State of New York, which facts appellant did not report to the Custodian. In the other New York indictment appellant and one Kaufmann were indicted for a conspiracy to omit to report to the Custodian the fact that appellant had in his custody and control certain property consisting of shares of the capital stock of the S. S. McClure Newspaper Corporation for and in behalf of the Imperial German Government, and that appellant was indebted to the said government in the sum of $1,431,700.

At the hearings before the Commissioner appellant admitted his identity and offered no evidence to meet the *prima facie* case made by producing an exemplified copy of the Washington indictment. On the other hand it was and is admitted in behalf of the Government that the New York indictments relate to the same transactions as the Washington indictment, and that they were pending in the Southern District of New York at the time the Washington indictment was found. To meet objections raised upon the hearing of the habeas corpus, the District Court embodied in the final order dismissing the writ clauses to the following effect:

(a) One giving the consent of that court to the removal of defendant to the District of Columbia notwithstanding the pendency of the indictments in the New York District;

(b) One directing a stay of removal pending appeal to this court;

(c) And one directing that, within thirty days after appellant had pleaded to the Washington indictment, the United States Attorney either for the Southern District of New York or for the District of Columbia should give him at least two weeks' notice as to which indictment it was intended to move first for trial.

Appellant's first point is that in a legal sense there was no probable cause to believe that he had been guilty of the offense charged in the Washington indictment because he could not be required to make a report to the Alien Property Custodian of the facts alleged in that indictment, since this would compel him in a criminal case to be a witness against himself, contrary to the provision of the Fifth Amendment to the Constitution of the United States in that behalf. As a basis for this contention appellant relies upon the uncontroverted averment in the first count of the Washington indictment that he held stock in the McClure Corporation for and on behalf of the German Government and did not report that fact to the Alien Property Custodian; adds to this the fact, said to have been established by his own evidence introduced before the Commissioner and not controverted by the Government, that during a considerable period he had traded for the benefit of and with the McClure Corporation, so that (it is said) he was guilty of trading with the enemy contrary to § 3 of the act; from which it is deduced that if, as required by § 7a of the act, he had reported to the Alien Property Custodian that he held the McClure Corporation stock for the German Government, as the first count of the Washington indictment alleges he was obliged to do, this disclosure would have tended to show that he

was guilty under § 3 of the act of trading without a license, because it would have furnished an essential link in the chain of evidence necessary to convict him of that offense.

It is at least questionable whether the point, assuming it to have merit, would have any application to the second count of the Washington indictment, which relates not to ownership of stock in the McClure Corporation, but to an indebtedness owing by appellant to the German Government and not reported.

And it is further doubtful whether there is foundation for the contention as applied to the first count, since appellant predicates his trading with the enemy solely upon the fact of his trading with the McClure Corporation, a New York corporation, whereas by § 2 of the act the definition of "enemy," for the purposes of the statute, is to include merely "any corporation incorporated within such territory of any nation with which the United States is at war or *incorporated within any country other than the United States* and doing business within such territory."

But consideration of these questions, or of any question raised under the Fifth Amendment, would be premature in this proceeding, since it is entirely plain that they do not go to show a "want of probable cause" within the meaning of the rule that is invoked. The accusatory averments of the indictment, admitted for the purposes of this proceeding to be true, make out a *prima facie* case of an offense against the laws of the United States indictable in the District of Columbia. *Hyde* v. *Shine*, 199 U. S. 62, 84; *Haas* v. *Henkel*, 216 U. S. 462, 481. Appellant's constitutional point merely raises a probability that a defense will be interposed, and that thus a controversy will arise, the determination of which is within the proper jurisdiction of the court in which the indictment was found. This furnishes no legal obstacle to the removal of the accused to that jurisdiction; nor may the writ of habeas cor-

pus be employed as an anticipatory writ of error. *Henry* v. *Henkel*, 235 U. S. 219, 229.

It is contended, indeed, that there was no probable cause to believe that the offense charged in the Washington indictment was committed within the District of Columbia; and this upon the ground that appellant was not personally present in the District at the time of the alleged offense, and that he was under no duty to make report there to the Alien Property Custodian. The Commissioner, however, found as a matter of fact that the Custodian's office was in the District of Columbia, and as the finding was supported by competent evidence the District Court properly held that it was not reviewable on writ of habeas corpus. That being so, the duty imposed by the statute to make report to the Alien Property Custodian involved the duty to make such report in the District of Columbia, and failure to make it was an offense against the United States committed in that District. *United States* v. *Lombardo*, 241 U. S. 73, 76; *New York Central &c. R. R. Co.* v. *United States*, 166 Fed. Rep. 267, 269.

It is contended that the removal of appellant to the District of Columbia amounts to an invasion of his constitutional right to a speedy trial on the New York indictments, and that the consent of the District Court for the Southern District of New York to such removal ought not to have been given without requiring from the representative of the Government a statement of reasons. These points raise no more than questions of discretion, the determination of which is not for our review.

Final order affirmed.

THE CHIEF JUSTICE dissents.

WASHINGTON POST COMPANY *v.* CHALONER.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 316. Argued April 22, 23, 1919.—Decided June 2, 1919.

A news statement that C shot and killed G while G was abusing his wife who had taken refuge at C's home, *held* not libelous *per se*. P. 293.

A publication claimed to be defamatory must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it. If it is capable of two meanings, one of which would be libelous and the other not, it is for the jury to say, under all the circumstances surrounding its publication, including extraneous facts admissible in evidence, which of the two meanings would be attributed to it by those to whom it is addressed or by whom it may be read. *Id.*

Irrelevant and scandalous matter may be stricken from the files of this court. P. 294.

47 App. D. C. 66, reversed.

THE case is stated in the opinion.

Mr. Wilton J. Lambert and *Mr. Joseph W. Bailey*, with whom *Mr. R. H. Yeatman* was on the brief, for petitioner.

Mr. E. F. Colladay and *Mr. Sidney J. Dudley*, with whom *Mr. H. S. Barger* was on the briefs, for respondent, cited the following in support of the contention that the words are actionable *per se: Washington Times* v. *Downey*, 26 App. D. C. 258; *Taylor* v. *Casey*, 1 Minor (Ala.), 258; *Culmer* v. *Canby*, 101 Fed. Rep. 195; *Raymond* v. *United States*, 25 App. D. C. 555; *Herrick* v. *Tribune Co.*, 108 Ill. App. 244; *Atwill* v. *Mackintosh*, 120 Massachusetts, 177; *Williams* v. *Fuller*, 68 Nebraska, 362; *Morse* v. *Times Republican Printing Co.*, 124 Iowa, 707; *Weeks* v.

News Publishing Co., 117 Maryland, 126; *Woolworth* v. *Star Company*, 90 N. Y. S. 147; 97 App. Div. 525; *Belo* v. *Fuller*, 84 Texas, 450; 17 Ruling Case Law, § 53; *Pollard* v. *Lyon*, 91 U. S. 225; *Peck* v. *Tribune Company*, 214 U. S. 185.

Mr. John Armstrong Chaloner, the respondent, filed a separate document.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Saturday, April 3, 1909, The Washington Post, a daily newspaper of wide circulation published by petitioner, contained the following item:

"John Armstrong Chaloner (Chanler), brother of Lewis Stuyvesant Chanler, of New York, and former husband of Amelie Rives, the authoress, now Princess Troubetskoy, is recuperating at Shadeland, the country home of Maj. Thomas L. Emry, near Weldon, N. C., where he had gone to recuperate following a nervous breakdown as a result of the tragedy at his home, Merry Mills, near Cobham, on March 15, when he shot and killed John Gillard, while the latter was abusing his wife, who had taken refuge at Merry Mills, Chaloner's home. Following the shooting, Chaloner suffered a nervous breakdown, and was ordered by his physician to take a long rest. He decided to visit his old friend, Maj. Emry, who, with Chaloner, was instrumental in founding Roanoke Rapids, a manufacturing town 5 miles from Weldon. Chaloner arrived at Weldon after traveling all night and was immediately hurried to Shadeland, where he received medical attention and temporary relief."

Claiming damages on account of shame, infamy and disgrace inflicted, respondent brought an action against the publishing company in the Supreme Court, District of Co-

lumbia. He alleged: "The said defendant, meaning and intending . . . to charge the plaintiff with the crime of murder in the killing of one John Gillard when on the contrary the fact was as defendant well knew, that while the plaintiff was engaged in a most laudable effort to prevent the said Gillard from murdering his wife, . . . the said Gillard was in fact killed by accidental explosion of a pistol," and "contriving and intending to deprive the plaintiff of his said good name, credit and reputation, and to bring him into scandal and disrepute among his friends, neighbors and acquaintances, . . . falsely and maliciously composed and published and caused to be composed and published of and concerning the plaintiff in a certain newspaper, etc.," the above-quoted item.

Upon respondent's request the trial court charged—"The jury are instructed that the words contained in the publication sued on by the plaintiff herein imply that the crime of murder had been committed by the plaintiff and are actionable *per se*." It further said to them—"The only question really, for you to consider, is how much damages the plaintiff should be allowed. You ought to allow him compensation; no special damages have been shown, and only general damages can be allowed, but where the libel is published, where words are published of the plaintiff which constituted a libel, which charge him with having committed a crime, for instance, as in this case, the law presumes that the plaintiff has been damaged, without proof of any special damage, because the law takes notice of the fact that a libel travels, and it comes to a great many different readers, and that it would be impossible for a plaintiff to trace out the circulation of the libel, and show by whom it had been read, and how it had affected their opinion of him, and all that; so that the jury are justified in allowing substantial damages to a plaintiff against whom a libel has been published, without proof of any particular or substantial damage to him."

Judgment in favor of respondent upon a verdict for $10,000 was affirmed by the Court of Appeals, 36 App. D. C. 231; 47 App. D. C. 66.

We think the quoted instructions to the jury were erroneous and harmful to petitioner.

The applicable rule was tersely stated by the Circuit Court of Appeals, Sixth Circuit, through Judge Lurton, afterwards of this court, in *Commercial Publishing Co.* v. *Smith*, 149 Fed. Rep. 704, 706, 707. Citing supporting authorities, he said:

"A publication claimed to be defamatory must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it. So the whole item, including display lines, should be read and construed together, and its meaning and signification thus determined. When thus read, if its meaning is so unambiguous as to reasonably bear but one interpretation, it is for the judge to say whether that signification is defamatory or not. If, upon the other hand, it is capable of two meanings, one of which would be libelous and actionable and the other not, it is for the jury to say, under all the circumstances surrounding its publication, including extraneous facts admissible in evidence, which of the two meanings would be attributed to it by those to whom it is addressed or by whom it may be read." See *Peck* v. *Tribune Company*, 214 U. S. 185, 190.

Counsel for respondent admit (and properly so) that, upon the authorities, a published item saying "C shot and killed G," without more, would not be libelous *per se*— it does not set forth the commission of a crime in unambiguous words. And we are unable to conclude that, as matter of law, addition of the words "while the latter was abusing his wife, who had taken refuge at Merry Mills, Chaloner's home" would convert such a statement into a definite charge of murder. On the contrary they might at least suggest to reasonable minds that the homicide was

without malice. Considering the wide circulation of present day newspapers and their power for doing injury to reputation, it is highly important that the ancient doctrine "Whatever a man publishes he publishes at his peril" should be strictly enforced. But this cannot be done properly by taking away from the jury doubtful questions of fact.

We find no reason to disagree with the conclusion reached by the Court of Appeals in respect of the other errors there assigned.

A writing entitled "Answer to Petition for Writ of Certiorari and Discussion of Matters of Fact in Brief for Petitioner" signed "John Armstrong Chaloner, *Pro Se*," and filed here April 21, 1919, contains much irrelevant and scandalous matter and is unfit for our files. It must be stricken from them.

The judgment below must be reversed and the cause remanded to the Supreme Court with instructions to grant a new trial.

Reversed.

MR. JUSTICE CLARKE took no part in the consideration or decision of this cause.

WILLIAMS, AS RECEIVER OF THE FIRST NATIONAL BANK OF BAYONNE, NEW JERSEY, *v.* VREELAND.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 318. Submitted April 23, 1919.—Decided June 2, 1919.

Where both parties without more request a peremptory instruction, they thereby assume the facts to be undisputed and, in effect, submit to the trial judge the determination of the inferences proper to be drawn from them; and his finding must stand upon review, if supported by proper evidence. P. 298.

A husband, without his wife's knowledge or consent, caused shares of a national bank to be issued and entered on its books in her name, and afterwards, telling her that it was a mistake, induced her to indorse them for transfer, in blank, to correct the supposed error, and with no intention to ratify, affirm or acquiesce in his unauthorized act. *Held*, that the facts could be shown, and that the wife was not liable to assessment although the shares remained in her name on the books when the bank failed. *Id.*

Approval, ratification and acquiescence all presuppose the existence of some actual knowledge of the prior action and what amounts to a purpose to abide by it. P. 299.

244 Fed. Rep. 346, affirmed.

THE case is stated in the opinion.

Mr. Stuart G. Gibboney for plaintiff in error.

Mr. Pierre P. Garven for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Williams, as receiver, sued defendant in error in the United States District Court for New Jersey to enforce

an assessment against her levied by the Comptroller of the Currency (§ 5151, Rev. Stats.) because she apparently owned certain stock of the First National Bank when it failed, December 6, 1913. She admits that the certificates were made out in her name and at time of the failure were so entered on the bank books. But she claims that, without her knowledge or consent, her husband caused them to be thus issued and entered. And further, that although she signed blank powers of attorney endorsed thereon and thereby made it possible to transfer the stock from her name, she never really approved, ratified or acquiesced in the transfer to herself.

Each side asked for an instructed verdict without more; the trial judge directed one in favor of Mrs. Vreeland, and in support of this action said—"Although the burden was upon the defendant to show that she was not in fact the owner of the stock, (*Finn* v. *Brown*, 142 U. S. 56, 67), I think that she has borne the burden by proving that the placing of the stock in her name in the first instance was unauthorized—without her knowledge and consent—and that she did not thereafter acquiesce in this act or in any way ratify it. . . . I am constrained to hold, therefore, that the defendant is not liable and that a verdict should be directed in her favor." Final judgment entered upon the consequent verdict was approved by the Circuit Court of Appeals. 244 Fed. Rep. 346.

In respect of the evidence and its conclusions therefrom the latter court said:

"The plaintiff proved that the defendant was a shareholder of record and that she did nothing to remove her name as such. This was sufficient to establish prima facie the defendant's liability. *Finn* v. *Brown*, 142 U. S. 56, 57; *Matteson* v. *Dent*, 176 U. S. 521, 530. The burden then shifted to her (*Finn* v. *Brown*, *supra*) to show that the act of making her a shareholder was in the first in-

stance unauthorized; that it was without her knowledge or consent; and that she has not since acquiesced in or ratified it. That she has sustained the burden upon the first two points is not disputed; therefore the remaining question is as to evidence of her ratification. . . . Considering this testimony in connection with corroborating testimony, it appears to us, that what Mary A. Vreeland did, in legal effect, was to make a valid execution of a power of attorney for the transfer of stock. That act, in so far as it authorized a transfer of stock, she cannot avoid by pleading ignorance. As the question here does not involve the validity of the act to effect a transfer, but concerns its evidential imputation of the knowledge with which it was done, we are of opinion that the circumstances which attended the act were a part of it and affected the evidential inferences to be drawn from it. These circumstances show, that before acting, the defendant requested to be informed as to what she was asked to do; this information was denied her. It was denied her under representations and influences, which, when she acted, led her to believe she was doing something entirely different from that which she was actually doing; that is, she was made to believe she was correcting a mistake of her husband, a mistake affecting his affairs, not that she was dealing with or assigning away her own property. Therefore, we think the circumstances were such as to negative the knowledge, which otherwise it is presumed her act would have imparted. They contradicted the normal imputations of her act, and left her without that knowledge which was a prerequisite to a valid ratification of her husband's unauthorized act."

It further held—

"Instead of submitting the case to the jury, however, each party asked the court for binding instructions in his favor, which, under *Beuttell* v. *Magone*, 157 U. S. 154, is not a submission to the court without the intervention

of a jury, within the intent of Rev. Stat., §§ 649, 700, but is equivalent to a joint request for a finding of fact by the court, and when the court, acting upon such request, directs the jury to find for one of the parties, both are concluded on its finding. In this case the parties submitted to the court the question of the wife's ratification of her husband's unauthorized act; that question was one of fact; upon it depended her liability. The court's decision, as evidenced by its instruction to the jury that they render a verdict for the defendant, was a finding of fact, which concluded both parties as effectually as if the same fact had been found by the jury."

The established rule is, "Where both parties request a peremptory instruction and do nothing more they thereby assume the facts to be undisputed and, in effect, submit to the trial judge the determination of the inferences proper to be drawn therefrom." And upon review, a finding of fact by the trial court under such circumstances must stand if the record discloses substantial evidence to support it. *Anderson* v. *Messenger*, 158 Fed. Rep. 250, 253; *Beuttell* v. *Magone, supra*, 157; *Empire State Cattle Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 210 U. S. 1, 8; *Sena* v. *American Turquoise Co.*, 220 U. S. 497, 501; *American National Bank* v. *Miller*, 229 U. S. 517, 520; *Mead* v. *Chesbrough Bldg. Co.*, 151 Fed. Rep. 998, 1002; *American National Bank* v. *Miller*, 185 Fed. Rep. 338, 341.

Counsel for the receiver maintained that, when Mrs. Vreeland endorsed the certificates in blank at the request of her husband who declared this necessary to enable him to correct his mistake, she thereby indisputably ratified his unauthorized transfer of the stock to her and assumed the duty promptly to remove her name from the bank books or suffer the liability imposed upon duly registered shareholders. But we think the courts below rightly held that facts and circumstances concerning this endorsement could be shown in order to negative the inference which

would have followed if unexplained. *Glenn* v. *Garth*, 133 N. Y. 18, 36, 37. And as without doubt there is substantial evidence tending to show she had no actual intention to ratify, affirm or acquiesce in her husband's unauthorized act, we must accept that as finally established.

In *Keyser* v. *Hitz*, 133 U. S. 138, which involved the liability of a married woman for an assessment levied against national bank stockholders, speaking through Mr. Justice Harlan, this court approved a charge—"If the stock in controversy was transferred upon the books of the German-American Savings Bank to and in the name of the defendant without her knowledge and consent, she was entitled to a verdict, unless she subsequently ratified and confirmed such transfer." And it was further said—"We must not be understood as saying that the *mere* transfer of the stocks on the books of the bank, to the name of the defendant, imposed upon her the individual liability attached by law to the position of shareholder in a national banking association. If the transfers were, in fact, without her knowledge and consent, and she was not informed of what was so done—nothing more appearing—she would not be held to have assumed or incurred liability for the debts, contracts and engagements of the bank. But if, after the transfers, she joined in the application to convert the savings bank into a national bank, or in any other mode approved, ratified or acquiesced in such transfers, or accepted any of the benefits arising from the ownership of the stock thus put in her name on the books of the bank, she was liable to be treated as a shareholder, with such responsibility as the law imposes upon the shareholders of national banks."

Approval, ratification and acquiescence all presuppose the existence of some actual knowledge of the prior action and what amounts to a purpose to abide by it. *Owings* v. *Hull*, 9 Pet. 607, 629; *Western National Bank* v. *Armstrong*, 152 U. S. 346, 352; *Glenn* v. *Garth*, *supra*. When

defendant in error signed blank powers of attorney she did not know what her husband had done and certainly entertained no purpose to approve transfer of the certificates to herself. She thought she was merely doing something to enable him to correct his avowed mistake and nothing else. Nobody was misled or put in a worse position as the result of her act. "As between the original parties that could not be deemed a ratification which was accompanied by a refusal to ratify, and a declared purpose to undo the unauthorized act. The form adopted, by itself and unexplained, would tend to an inference of ratification, but it is not left unexplained. The actual truth is established, and that truth must prevail over the form adopted as between parties who have not been misled, to their harm, by the form of the transaction as distinguished from its substance." "The presumption which might have flowed from the form of the transaction disappears upon the explanation made, and in view of the substantial truth proved by the evidence." *Glenn* v. *Garth*, *supra*, 36, 37.

The record reveals no material error and the judgment below is

Affirmed.

UNITED STATES *v.* COLGATE & COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

No. 828. Argued March 10, 1919.—Decided June 2, 1919.

On a writ of error under the Criminal Appeals Act, this court must confine itself to the question of the construction of the statute involved in the decision of the District Court, accepting that court's interpretation of the indictment. P. 301.

In the absence of any intent to create or maintain a monopoly, the Sherman Act does not prevent a manufacturer engaged in a private business from announcing in advance the prices at which his goods may be resold and refusing to deal with wholesalers and retailers who do not conform to such prices. P. 307.

As the court interprets the District Court's opinion, the indictment in this case was interpreted as not charging the defendant with selling to dealers under agreements obligating them not to resell at prices other than those fixed by defendant. P. 306. *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, distinguished.

253 Fed. Rep. 522, affirmed.

The case is stated in the opinion.

Mr. Assistant to the Attorney General Todd, with whom *Mr. Henry S. Mitchell*, Special Assistant to the Attorney General, was on the brief, for the United States.

Mr. Charles E. Hughes, with whom *Mr. Charles Wesley Dunn* and *Mr. Mason Trowbridge* were on the brief, for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Writs of error from District Courts directly here may be taken by the United States "From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded." (Act of March 2, 1907, c. 2564, 34 Stat. 1246.) Upon such a writ "we have no authority to revise the mere interpretation of an indictment and are confined to ascertaining whether the court in a case under review erroneously construed the statute." "We must accept that court's interpretation of the indictments and confine our review to the question of the construction of the statute involved in its

decision." *United States* v. *Carter*, 231 U. S. 492, 493; *United States* v. *Miller*, 223 U. S. 599, 602.

Being of opinion that "The indictment should set forth such a state of facts as to make it clear that a manufacturer, engaged in what was believed to be the lawful conduct of its business, has violated some known law, before it is haled into court to answer the charge of the commission of a crime" and holding that it "fails to charge any offense under the Sherman Act or any other law of the United States, that is to say, as to the substance of the indictment and the conduct and acts charged therein" the trial court sustained a demurrer to the one before us. Its reasoning and conclusions are set out in a written opinion. 253 Fed. Rep. 522.

We are confronted by an uncertain interpretation of an indictment itself couched in rather vague and general language. Counsel differ radically concerning the meaning of the opinion below and there is much room for the controversy between them.

The indictment runs only against Colgate & Company, a corporation engaged in manufacturing soap and toilet articles and selling them throughout the Union. It makes no reference to monopoly, and proceeds solely upon the theory of an unlawful combination. After setting out defendant's organization, place and character of business and general methods of selling and distributing products through wholesale and retail merchants, it alleges—

"During the aforesaid period of time, within the said eastern district of Virginia and throughout the United States, the defendant knowingly and unlawfully created and engaged in a combination with said wholesale and retail dealers, in the eastern district of Virginia and throughout the United States, for the purpose and with the effect of procuring adherence on the part of such dealers (in reselling such products sold to them as aforesaid) to resale prices fixed by the defendant, and of pre-

venting such dealers from reselling such products at lower prices, thus suppressing competition amongst such wholesale dealers, and amongst such retail dealers, in restraint of the aforesaid trade and commerce among the several States, in violation of the act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July 2, 1890."

Following this is a summary of things done to carry out the purposes of the combination: Distribution among dealers of letters, telegrams, circulars and lists showing uniform prices to be charged; urging them to adhere to such prices and notices, stating that no sales would be made to those who did not; requests, often complied with, for information concerning dealers who had departed from specified prices; investigation and discovery of those not adhering thereto and placing their names upon "suspended lists"; requests to offending dealers for assurances and promises of future adherence to prices, which were often given; uniform refusals to sell to any who failed to give the same; sales to those who did; similar assurances and promises required of, and given by, other dealers followed by sales to them; unrestricted sales to dealers with established accounts who had observed specified prices, etc.

Immediately thereafter comes this paragraph:

"By reason of the foregoing, wholesale dealers in the aforesaid products of the defendant in the eastern district of Virginia and throughout the United States, with few exceptions, resold, at uniform prices fixed by the defendant, the aforesaid products, sold to them by the defendant, and refused to resell such products at lower prices to retail dealers in the States where the respective wholesale dealers did business and in other States. For the same reason retail dealers in the aforesaid products of the defendant in the eastern district of Virginia and throughout the United States resold, at uniform prices fixed by

the defendant, the aforesaid products, sold to them by the defendant and by the aforesaid wholesale dealers, and refused to sell such products at lower prices to the consuming public in the States where the respective retail dealers did business and in other States. Thus competition in the sale of such products, by wholesale dealers to retail dealers, and by retail dealers to the consuming public, was suppressed, and the prices of such products to the retail dealers and to the consuming public in the eastern district of Virginia and throughout the United States were maintained and enhanced."

In the course of its opinion the trial court said:

"No charge is made that any contract was entered into by and on the part of the defendant, and any of its retail customers, in restraint of interstate trade and commerce—the averment being, in effect, that it knowingly and unlawfully created and engaged in a combination with certain of its wholesale and retail customers, to procure adherence on their part, in the sale of its products sold to them, to resale prices fixed by the defendant, and that, in connection therewith, such wholesale and retail customers gave assurances and promises, which resulted in the enhancement and maintenance of such prices, and in the suppression of competition by wholesale dealers and retail dealers, and by the latter to the consuming public."

* * * * * * * * * *

"In the view taken by the court, the indictment here fairly presents the question of whether a manufacturer of products shipped in interstate trade, is subject to criminal prosecution under the Sherman Act, for entering into a combination in restraint of such trade and commerce, because he agrees with his wholesale and retail customers, upon prices claimed by them to be fair and reasonable, at which the same may be resold, and

declines to sell his products to those who will not thus stipulate as to prices. This, at the threshold, presents for the determination of the court how far one may control and dispose of his own property; that is to say, whether there is any limitation thereon, if he proceeds in respect thereto in a lawful and bona fide manner. That he may not do so fraudulently, collusively, and in unlawful combination with others, may be conceded. *Eastern States Lumber Association* v. *United States*, 234 U. S. 600, 614. But it by no means follows that, being a manufacturer of a given article, he may not, without incurring any criminal liability, refuse absolutely to sell the same at any price, or to sell at a named sum to a customer, with the understanding that such customer will resell only at an agreed price between them, and, should the customer not observe the understanding as to retail prices, exercise his undoubted right to decline further to deal with such person."

* * * * * * * * * *

"The pregnant fact should never be lost sight of that no averment is made of any contract or agreement having been entered into whereby the defendant, the manufacturer, and his customers, bound themselves to enhance and maintain prices, further than is involved in the circumstances that the manufacturer, the defendant here, refused to sell to persons who would not resell at indicated prices, and that certain retailers made purchases on this condition, whereas, inferentially, others declined so to do. No suggestion is made that the defendant, the manufacturer, attempted to reserve or retain any interest in the goods sold, or to restrain the vendee in his right to barter and sell the same without restriction. The retailer, after buying, could, if he chose, give away his purchase, or sell it at any price he saw fit, or not sell it at all; his course in these respects being affected only by

the fact that he might by his action incur the displeasure of the manufacturer, who could refuse to make further sales to him, as he had the undoubted right to do. There is no charge that the retailers themselves entered into any combination or agreement with each other, or that the defendant acted other than with his customers individually."

Our problem is to ascertain, as accurately as may be, what interpretation the trial court placed upon the indictment—not to interpret it ourselves; and then to determine whether, so construed, it fairly charges violation of the Sherman Act. Counsel for the Government maintain, in effect, that, as so interpreted, the indictment adequately charges an unlawful combination (within the doctrine of *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373) resulting from restrictive agreements between defendant and sundry dealers whereby the latter obligated themselves not to resell except at agreed prices; and to support this position they specifically rely upon the above-quoted sentence in the opinion which begins "In the view taken by the court," etc. On the other hand, defendant maintains that looking at the whole opinion it plainly construes the indictment as alleging only recognition of the manufacturer's undoubted right to specify resale prices and refuse to deal with anyone who failed to maintain the same.

Considering all said in the opinion (notwithstanding some serious doubts) we are unable to accept the construction placed upon it by the Government. We cannot, *e. g.*, wholly disregard the statement that "The retailer, after buying, could, if he chose, give away his purchase, or sell it at any price he saw fit, or not sell it at all; his course in these respects being affected only by the fact that he might by his action incur the displeasure of the manufacturer, who could refuse to make further sales to him, as he had the undoubted right to do." And we

must conclude that, as interpreted below, the indictment does not charge Colgate & Company with selling its products to dealers under agreements which obligated the latter not to resell except at prices fixed by the company.

The position of the defendant is more nearly in accord with the whole opinion and must be accepted. And as counsel for the Government were careful to state on the argument that this conclusion would require affirmation of the judgment below, an extended discussion of the principles involved is unnecessary.

The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell. "The trader or manufacturer, on the other hand, carries on an entirely private business, and can sell to whom he pleases." *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 320. "A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade." *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600 614. See also *Standard Oil Co.* v. *United States*, 221 U. S. 1, 56; *United States* v. *American Tobacco Co.*, 221 U. S. 106, 180; *Boston Store of Chicago* v. *American Graphophone Co.*, 246 U. S. 8. In *Dr. Miles Medical Co.* v. *Park & Sons Co.*, *supra*, the unlawful

combination was effected through contracts which undertook to prevent dealers from freely exercising the right to sell.

The judgment of the District Court must be

Affirmed.

CAMP ET AL. *v.* GRESS.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 279. Argued March 24, 25, 1919.—Decided June 2, 1919.

Under § 51 of the Judicial Code (Act of 1887–1888, § 1), when an action for damages is brought against several defendants in the district where some of them reside and the jurisdiction of the District Court is founded solely on diversity of citizenship, a codefendant cannot be compelled to submit to the jurisdiction by service in that district if he is a citizen and resident of another State. P. 311. *Smith* v. *Lyon*, 133 U. S. 315.

This construction is confirmed by the reënactment of the subject-matter, already so construed, as part of the Judicial Code, together and in juxtaposition with the provision (Jud. Code, § 52) expressly permitting an action not of a local nature against defendants residing in different districts of the same State to be brought in either district. P. 314.

In what is now Jud. Code, § 50, providing for the exercise of jurisdiction "when there are several defendants . . . and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear," the words "found within the district" are confined, as a result of the Act of 1887–1888, § 1, (Jud. Code, § 51,) to cases in which the action is brought in the district of the plaintiff's residence. P. 313.

Where an action on contract is brought against resident and nonresident defendants, the exemption of the nonresident from suit, under Jud. Code, § 51, is personal to him and can not be availed of by his codefendants. P. 316.

In an action for damages on a joint contract, all of the obligors are not indispensable parties, and under Jud. Code, § 50, the District Court may render judgment against those over whom it has acquired jurisdiction. P. 316.

In such case, error in assuming jurisdiction and rendering judgment as to all of the joint contractors will not necessitate a reversal as to those properly included, if their interests could not have been prejudiced thereby. P. 317.

Appellate proceedings in this court and in the Circuit Court of Appeals are not affected by the Conformity Act, but are governed entirely by the acts of Congress, the common law, and the ancient English statutes. *Id.*

In cases coming from federal courts, this court has statutory power to enter such judgment or order as the nature of the case requires, and by the Act of February 26, 1919, amending Jud. Code, § 269, the duty is especially enjoined of giving judgment in appellate proceedings without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties. P. 318.

A writ of certiorari to the Circuit Court of Appeals brings up the whole case, including questions affecting the merits, if properly saved, as well as those concerning the jurisdiction of the District Court. *Id.*

A, the owner of all the shares of a corporation, in which, or its assets, no other person was shown to be interested, agreed under seal to convey certain saw-mill property, standing in its name, to a common venture with other parties, who agreed to convey timber lands, and that he and they should share in the venture in stated proportions. Due to their repudiation of their obligation, the saw-mill property depreciated in value; and, it appearing that he was either its equitable owner, independently of his stock ownership, or acted as secret agent for the corporation—*Held*, that A could recover the full damage in an action on the contract, without any accounting and settlement of the corporation's affairs, and that the measure was the whole depreciation, and not merely a part of it proportionate to the other parties' stipulated interest in the proposed enterprise. *Id.*

244 Fed. Rep. 121, reversed in part and affirmed in part.

THE case is stated in the opinion.

Mr. T. D. Savage and *Mr. Thomas H. Willcox* for petitioners.

Mr. D. Lawrence Groner and *Mr. W. M. Toomer*, with whom *Mr. Alexander Akerman* was on the briefs, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Section 51 of the Judicial Code declares that (with exceptions not here material) "no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Resting jurisdiction wholly on diversity of citizenship, Gress, a citizen and resident of Florida, brought, in the District Court of the United States for the Eastern District of Virginia, this action against P. D. Camp, P. R. Camp, and John M. Camp, alleging them to be citizens of Virginia and residents of that district. One of them, John M., filed a "plea to jurisdiction," asking that the suit be dismissed, because he was not a citizen or resident of the district in which it was brought, but a citizen of North Carolina, resident in the Eastern District thereof. P. D. and P. R. Camp filed a separate "plea to jurisdiction" setting up the same facts, alleging that the cause of action sued on was joint and inseparable, and denying jurisdiction as to themselves also, because there was none as to John M. Camp. The pleas were overruled; the case proceeded to trial; a verdict was rendered against the three defendants, and judgment was entered thereon. Exceptions had been duly taken both by John M. and by P. D. and P. R. Camp to the decision overruling their pleas to the jurisdiction, and by the three defendants to certain rulings at the trial alleged to be erroneous; but

the judgment was affirmed by the Circuit Court of Appeals. 244 Fed. Rep. 121. A writ of certiorari was granted by this court. 245 U. S. 655.

First. The several defendants below, although not citizens of the same State, were all citizens of States other than that of the plaintiff. Hence, the diversity of citizenship requisite to federal jurisdiction existed. *Sweeney* v. *Carter Oil Co.*, 199 U. S. 252. The objection of John M. Camp is not to the jurisdiction of a federal court, but to the jurisdiction over him of the court of the particular district; that is, the objection is to the venue. He asserts the personal privilege not to be sued in a district other than that of his residence, since the action is not brought in the district of the plaintiff's residence. If he were a sole defendant, or if none of the defendants resided in the district where suit was brought, the privilege asserted would be supported by the very language of the statute. *Macon Grocery Co.* v. *Atlantic Coast Line R. R. Co.*, 215 U. S. 501. Section 51 of the Judicial Code does not in terms provide for the case where there are several defendants. Does the limitation of jurisdiction to the district of the residence "of either the plaintiff or the defendant" mean also of all the plaintiffs or all the defendants, so that when the several defendants are not all residents of the district in which they are sued, the nonresident may assert the privilege not to be sued therein? The precise question has not been decided by this court; but the construction already given to this section in analogous cases and to analogous provisions in other statutes makes it clear that the privilege asserted should be sustained.

Section 51 of the Judicial Code embodies in substance the Act of March 3, 1887, c. 373, § 1, 24 Stat. 552, as corrected by Act of August 13, 1888, c. 866, § 1, 25 Stat. 433. From the passage of the original Judiciary Act (September 24, 1789, c. 20, § 11, 1 Stat. 73, 79), until 1887, suit could be brought not only in the district of defendant's resi-

dence, but also in any other district in which the defendant was found. The 1887–1888 act accomplished its purpose of restricting the jurisdiction of the federal courts, in part, by limiting the districts in which suit might be brought to that of the defendant's or of the plaintiff's residence. See *In re Keasbey & Mattison Co.*, 160 U. S. 221, 228. In *Smith* v. *Lyon*, 133 U. S. 315, the question was presented whether this limitation prohibited suit in a district in which some, but not all, of the *plaintiffs* were resident. The court felt itself controlled largely by the construction which had been given in *Strawbridge* v. *Curtiss*, 3 Cranch, 267, to a clause of the original Judiciary Act, similar in language and analogous in subject-matter, and had been steadfastly adhered to since. There this court construed the phrase, "where . . . the suit is between a citizen of the State where the suit is brought, and a citizen of another State" as meaning "that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts [courts of the United States]." Adopting a like construction, this court held in *Smith* v. *Lyon*, *supra*, that suit could not be brought in a district in which some, but not all, of the plaintiffs resided. The rule declared in *Strawbridge* v. *Curtiss* had been applied indiscriminately to plaintiffs and defendants; and after the decision in *Smith* v. *Lyon* it was generally assumed in the lower courts that the rule there applied to plaintiffs must likewise be applied to defendants.[1] Compare *Shaw* v. *Quincy Mining*

[1] E. g., *Turk* v. *Illinois Cent. R. Co.*, 218 Fed. Rep. 315, 316 (C. C. A., Sixth Circuit); *Excelsior Pebble Phosphate Co.* v. *Brown*, 74 Fed. Rep. 321 (C. C. A., Fourth Circuit); *Revett* v. *Clise*, 207 Fed. Rep. 673, 676 (Wash.); *Schultz* v. *Highland Gold Mines Co.*, 158 Fed. Rep. 337, 340 (Oreg.); *Tice* v. *Hurley*, 145 Fed. Rep. 391 (Ky.); *Lengel* v. *American Smelting & Refining Co.*, 110 Fed. Rep. 19, 21 (N. J.); *Bensinger Self-Adding Cash Register Co.* v. *National Cash Register Co.*, 42 Fed. Rep. 81 (Mo.). But see *Jennings* v. *Smith*, 232 Fed. Rep. 921, 925 (Ga.); *Rawitzer* v. *Wyatt*, 40 Fed. Rep. 609 (Cal.).

Co., 145 U. S. 444; *Geneva Furniture Co.* v. *Karpen*, 238 U. S. 254, 259. The same assumption appears to have been made in *Interior Construction and Improvement Co.* v. *Gibney*, 160 U. S. 217, where the question was raised whether the resident defendant could avail himself of the objection that another defendant, who was a nonresident, was not liable to suit therein. And in *Ladew* v. *Tennessee Copper Co.*, 218 U. S. 357, 364–365, a like rule was applied; for it was there held that, although an alien defendant could be sued in any district where found, an American citizen joined with him as co-defendant could not, without his consent, be sued in a district other than that of his or the plaintiff's residence.

It is said, however, that § 51, if read in connection with § 50 and in the light of their legislative history, shows that it was the intention of Congress to confer jurisdiction over all the defendants found within the district, if one of them resides therein. Section 50,[1] which embodies without substantial change the Act of February 28, 1839, c. 36, § 1, 5 Stat. 321, makes provision for enforcing a cause of action which exists against several persons, although one of them is neither an inhabitant of nor found within the district in which suit is brought and does not voluntarily appear. It does so by permitting the court to entertain jurisdiction without prejudice to the rights of the party not regularly served nor voluntarily appearing. The argument is that, in order to give

[1] "When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit."

effect to the retention in § 50 of the words "found within the district," we must, although these words were omitted from § 51, hold that where there are several defendants the court has jurisdiction of all, if one or more are residents of the district and the others are found there. The argument overlooks the fact that § 50 is applicable not only to cases in which the venue is dependent upon the residence of a defendant in the district where suit is brought, but also to those cases in which it is dependent upon the residence of the plaintiff. Ordinarily jurisdiction could be obtained in the district of the plaintiff's residence only over nonresidents; because all of the defendants must be nonresidents in order to satisfy the requirement of diversity of citizenship. And as to these there can be personal jurisdiction only so far as found within or voluntarily appearing within the district. To such persons the term "inhabitants" in § 50 obviously cannot refer. If the provision therein concerning those not "found" had been omitted, a suit would fail in case any one of those who at common law was a necessary party defendant should not be found therein or voluntarily appear. *Shields* v. *Barrow*, 17 How. 130. As the Act of 1887–1888 did not restrict jurisdiction based on diversity of citizenship in those cases where the venue is determined by the residence of the plaintiff, it was appropriate to retain in the earlier statute (now § 50) the words "found within the district," although it had ceased to be operative in cases where the venue is determined by the residence of the defendants.

On the other hand, § 52 of the Judicial Code makes it clear that the construction contended for by defendant is unsound. It provides that where a State contains more than one district a suit (not of a local nature) against a single defendant must be brought in the district where he resides, "but if there are two or more defendants, residing in different districts of the State, it may be

brought in either district." We thus have an express declaration by Congress that under one particular set of circumstances a co-defendant may be sued in a district in which he does not reside. *Expressio unius est exclusio alterius.* This section follows directly after that which contains the general prohibition against suing a defendant in a district other than that in which he or the plaintiff resides, and constitutes one of the specified exceptions to the general prohibition. It shows, therefore, that the prohibition of § 51 expresses the deliberate purpose of Congress that a person shall not be compelled to submit to suit in the federal District Court in a State within which neither he nor the plaintiff resides, although a co-defendant may reside therein. The history of § 52 confirms this conclusion. It is substantially a reënactment of § 740 of the Revised Statutes. After the passage of the Act of 1887–1888 restricting the jurisdiction of the federal courts, considerable doubt arose as to whether the provisions of that act now contained in § 51 of the Judicial Code did not repeal § 740 of the Revised Statutes. Compare *Petri* v. *Creelman Lumber Co.*, 199 U. S. 487.[1] Congress reënacted in the Judicial Code this provision expressly permitting, in States having more than one district, *all defendants resident within the State* to be sued in any district thereof in which one of them resides; while it made no similar provision for the case where the several defendants reside in different States. If Congress, in reënacting the provisions of § 51, had intended that it should establish a rule with reference to defendants resident in different States contrary to the construction placed by the overwhelming weight of authority upon

[1] See also *Doscher* v. *United States Pipe Line Co.*, 185 Fed. Rep. 959; *John D. Park & Sons Co.* v. *Bruen*, 133 Fed. Rep. 806; *New Jersey Steel & Iron Co.* v. *Chormann*, 105 Fed. Rep. 532; *Goddard* v. *Mailler*, 80 Fed. Rep. 422; *East Tennessee, V. & G. R. Co.* v. *Atlanta & F. R. Co.*, 49 Fed. Rep. 608.

the identical provision contained in the earlier statute, it would have expressed that intention in unmistakable language.

No reason appears, therefore, for refusing to apply here the rule of *Smith* v. *Lyon*, *supra*. The objection made below that the plea to the jurisdiction is bad because not limited by its terms to the question of jurisdiction over the particular defendant is highly technical, and was hardly insisted upon here; and the contention that his exemption from suit was waived by the acknowledgment on the summons of service is clearly unfounded. John M. Camp properly asserted his privilege by plea to the jurisdiction, and the plea should have been sustained. It follows that the judgment against him is void; that the judgment of the Circuit Court of Appeals, in so far as it affirms the judgment of the District Court against him, should be reversed; and the suit should be dismissed as to him.

Second. The plea to the jurisdiction filed by P. D. and P. R. Camp was properly overruled. The objection was based wholly on the fact that John M. Camp was not suable within the district. This is an exemption from suit personal to the nonresident of the district. A resident co-defendant cannot avail himself of the objection.[1] If John M. had been an indispensable party, the failure to obtain jurisdiction over him would, of course, be fatal to the maintenance of the suit. *Barney* v. *Baltimore City*, 6 Wall. 280. But he was not an indispensable party; and under § 50 of the Judicial Code the trial court might, if it had sustained John M.'s plea to the jurisdiction, have rendered judgment against the other two defend-

[1] *Tice* v. *Hurley*, 145 Fed. Rep. 391, 392; *Chesapeake & O. Coal Agency Co.* v. *Fire Creek Coal & Coke Co.*, 119 Fed. Rep. 942; *Smith* v. *Atchison, T. & S. F. R. Co.*, 64 Fed. Rep. 1, 2; *Jewett* v. *Bradford Sav. Bank & Trust Co.*, 45 Fed. Rep. 801; *Bensinger Self-Adding Cash Register Co.* v. *National Cash Register Co.*, 42 Fed. Rep. 81, 82.

ants; for this is an action on a joint contract, and one of the several joint-contractors is not an indispensable party defendant in such a suit. *Clearwater* v. *Meredith*, 21 How. 489.

Third. P. D. Camp and P. R. Camp contend that, in view of the error in overruling John M. Camp's plea to the jurisdiction and proceeding to judgment against him, the court may not confine its action to correcting the error by setting aside the judgment and dismissing the suit as to him, but must set aside the judgment as against all the defendants, thus requiring a new trial as against the other two. But this is not a necessary result of erroneously retaining jurisdiction over John M. Camp; for, as above shown, John M. was not an indispensable party to a suit to enforce the liability of the other two joint obligors; and if the trial court had sustained his plea to the jurisdiction, the suit might, under § 50 of the Judicial Code, have proceeded to judgment as against the other defendants. Whether the error committed in retaining jurisdiction over John M. requires a reversal of the judgment as against the other defendants depends upon whether that error may have prejudiced them. The record does not show that the error committed could have prejudiced them in any way; and their counsel admitted at the bar that the error had not prevented them from availing themselves of any defense, and had not influenced the admission or rejection of evidence, or the granting or refusal of any instruction asked or given. Only error which may have resulted in prejudice could justify reversal of a judgment. Compare *Yazoo & Mississippi Valley R. R. Co.* v. *Mullins*, 249 U. S. 531.

It is, however, contended that the Virginia practice would require a reversal of the judgment as against all defendants, and that the Conformity Act (Revised Statutes, § 914) requires that the state practice be followed. If such were the Virginia practice, which is denied, it

would not be binding on this court. The Conformity Act by its express terms refers only to proceedings in District (and formerly Circuit) Courts and has no application to appellate proceedings either in this court or in the Circuit Court of Appeals. Such proceedings are governed entirely by the acts of Congress, the common law, and the ancient English statutes. *United States* v. *King*, 7 How. 833, 844; *Boogher* v. *Insurance Co.*, 103 U. S. 90, 95; *Chateaugay Ore & Iron Co., Petitioner*, 128 U. S. 544; *St. Clair* v. *United States*, 154 U. S. 134, 153; *Francisco* v. *Chicago & A. R. Co.*, 149 Fed. Rep. 354, 358–359; *United States* v. *Illinois Surety Co.*, 226 Fed. Rep. 653, 664. In cases coming from federal courts the Supreme Court is given by statute full power to enter such judgment or order as the nature of the appeal or writ of error (or certiorari, § 240 of the Judicial Code) requires. Revised Statutes, § 701. Circuit Court of Appeals Act of March 3, 1891, c. 517, § 11, 26 Stat. 826, 829. See also § 10 of the same act. Compare *Ballew* v. *United States*, 160 U. S. 187, 198, *et seq.* And by Act of February 26, 1919, c. 48, 40 Stat. 1181, amending § 269 of the Judicial Code, the duty is especially enjoined of giving judgment in appellate proceedings "without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

The error in retaining jurisdiction over John M. Camp, does not, therefore, require that the judgment as against the other two defendants be set aside.

Fourth. P. D. and P. R. Camp contend, however, that the judgment against them should be reversed also on the ground that there was error in the instructions as to the measure of damages. The contention must be examined, as the whole case is here on writ of certiorari and the objection was properly saved. *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 257, 267; *Delk* v. *St. Louis & San Francisco R. R. Co.*, 220 U. S. 580, 588.

Gress was the owner of the entire capital stock of the Morgan Lumber Company, a corporation which held the title to saw-mill properties in Florida. The three defendants Camp were the owners of valuable timber lands near the mill. By contract under seal dated August 18, 1913, the Camps agreed to join with Gress in organizing a corporation under the name of Levy County Lumber Company to which Gress would convey the saw-mill properties which the parties valued at $125,000, and the Camps would convey the timber lands which they valued at $325,000; that Gress should receive, in exchange for the mill properties, five-eighteenths of the stock in the new company and the Camps, in exchange for the lands, thirteen-eighteenths of the stock; and that the parties should in that proportion finance the company. Gress was ready and willing and able to perform his part of the contract; and the Camps broke it by definitely refusing to perform. The only question in the case seriously controverted was the amount of damages recoverable. There was evidence that by reason of the breach of contract which resulted in depriving the mill of its timber supply its value depreciated heavily. The trial judge charged the jury that among the elements of damages recoverable was the amount of the depreciation in the market value of the mill between the date of the contract and the date of the breach. The objection made to this ruling was based wholly on the ground that, as the mill properties were vested in the Morgan Lumber Company, Gress could not recover more than nominal damages, although he owned all of its stock. The contention is that before it could be determined whether plaintiff, as owner of the stock of the Morgan Lumber Company, sustained any damages by reason of the depreciation in value of the mill property, an accounting and settlement of the Morgan Lumber Company's affairs would be necessary; and it is urged that the lower court, in rejecting a ruling to that

effect and in charging as it did, held erroneously that the person who owns the entire capital stock of a corporation is in fact and in law identical with the corporation.

The contention appears to rest upon a misapprehension of the plaintiff's position. The contract recited that Gress owned the mill, and that the title only was in the Morgan Lumber Company. If so, the depreciation would clearly be a loss suffered by Gress, and he could recover as compensation an amount equal to that loss, since he was equitable owner with power to require an immediate conveyance of the legal title. There was also introduced in evidence a vote of the directors of the Morgan Lumber Company, which, referring to the contract of August 18, 1913, as having been made by Gress "representing the Morgan Lumber Company," approved the same "in its entirety." There was not a particle of evidence that any other person had any interest of any kind in the corporation or its assets. Consequently, whether Gress entered into the contract technically on his own behalf or technically as agent for the corporation, his undisclosed principal, is immaterial. In either case the suit is one brought by him individually; in either case all the loss suffered through defendants' breach of contract is recoverable by Gress; in either case the measure of damage is the same.[1] There is no basis for the contention that an accounting and settlement of the Morgan Lumber Company's affairs was necessary in order to determine the amount of plaintiff's loss; and the failure to require such an accounting does not involve any disregard of the corporate entity.

The decision of the Circuit Court of Appeals denying the contention that the plaintiff was entitled to recover only thirteen-eighteenths of the loss due to the depre-

[1] *United States Telegraph Co.* v. *Gildersleve*, 29 Maryland, 232, 246; *Leterman* v. *Charlottesville Lumber Co.*, 110 Virginia, 769, 772; *Groover, Stubbs & Co.* v. *Warfield & Wayne*, 50 Georgia, 644, 654; *Joseph* v. *Knox*, 3 Campb. 320.

ciation in the mill properties was clearly correct. If the jury believed as contended that defendants' breach of contract, by depriving those properties of a timber supply, reduced their value, the plaintiff's loss in that respect was the whole of the reduced value. On the other hand, if the market value of the timber lands increased, the plaintiff's loss from being deprived of the gain from this source was, as the court ruled, only five-eighteenths of that gain. There was no other objection taken which requires us to consider whether the rulings as to damages were in other respects proper.

The judgment as to P. D. Camp and P. R. Camp is affirmed and as to John M. Camp is reversed and the case as so modified is remanded to the District Court of the United States for the Eastern District of Virginia with directions to dismiss the suit as to John M. Camp.

Modified and affirmed.

BENEDICT v. CITY OF NEW YORK

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 315. Argued April 22, 1919.—Decided June 2, 1919.

A suit against a city to enforce, as upon an express trust, an accounting of an improvement fund and liability for alleged breaches of trust in failing properly to conduct the sales of lands assessed for benefits and properly to apply the proceeds of such sales to the satisfaction of public improvement certificates, said suit not having been instituted until more than 17 years after definite repudiation of the alleged trust duties, and the efforts on behalf of the plaintiff having been meanwhile confined to the obtaining of a restraining order, which was never observed, and to the presentation of divers

memorials and offers of compromise to the city authorities, *held* barred by laches, such a cause of action, in New York, being subject, if not to the six-year statute of limitations (Code Civ. Pro., § 382), then to the ten-year statute (*id.*, § 388) governing bills for relief in cases of trust not cognizable by courts of common law. Pp. 325-327.

In case of an express trust, the statute begins to run when the trust is repudiated. *Id.*

Federal courts, in equity, are not bound by state statutes of limitations, but are ordinarily guided by them in determining their action on stale claims. *Id.*

247 Fed. Rep. 758, affirmed.

THE case is stated in the opinion.

Mr. Leon Abbett, with whom *Mr. Charles K. Allen* was on the brief, for appellant.

Mr. Terence Farley, with whom *Mr. William P. Burr* and *Mr. George P. Nicholson* were on the brief, for appellee.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

In 1874 commissioners theretofore appointed by special act (Laws N. Y. 1871, c. 765) to improve the streets of Long Island City were directed to improve a particular district. Laws N. Y. 1874, c. 326. The act provided that the cost of the improvement should be assessed upon the land benefited and created a lien upon the land for the assessment and interest; but it declared that no sale for failure to pay the assessment could be made before the expiration of ten years after filing of the assessment roll. The improvement was to be paid for by delivering to the contractors interest-bearing certificates of indebtedness equal, at par, to the expense of the work and materials furnished. These certificates did not provide

for a personal obligation on the part of the city or the district. They were receivable in payment of assessments at par and interest and were payable in cash only out of moneys to be derived from the assessments, which the city treasurer was directed to keep as an Improvement Fund separate from all other funds. The statute further provided that upon the completion of the sales for non-payment of assessments "all the certificates issued by the said commissioners shall be paid off, and if there be any excess to the credit of said improvement fund . . . it shall be paid into the city treasury." By an amendment passed June 11, 1879 (Laws N. Y. 1879, c. 501), it was provided that, under certain circumstances, it was the duty of the officer making sale of land for non-payment of assessment to receive, in payment of the purchase price, certificates at par and interest.

Certificates were issued to the amount of $1,847,500. A large portion of the assessments levied were left unpaid by the land owners; and it became necessary to sell the properties. Sales for non-payment of assessments were made in 1888. The purchase price was paid in certificates at par and interest up to the amount of the assessments, the interest and the excess, if any, being paid in cash. In 1892 and 1893 sales of land were made at much less than the amounts of the assessment. Here also bidders were permitted to pay the purchase price in certificates at par and interest. Likewise the owners of lots sold were permitted to redeem lots upon paying the amount of the bid and accrued charges by certificates at par and interest. After all the land had been disposed of and the Improvement Fund exhausted there remained and are now outstanding unpaid certificates aggregating about $300,000.

Prior to June 11, 1879, Benedict acquired certificates to the amount of $8000 which he has held ever since, and on which the principal and interest are unpaid. In July,

1910, suing on behalf of himself and others similarly situated, he brought this suit in the Circuit (now District) Court of the United States for the Southern District of New York to enforce, as upon an express trust, an accounting of the Improvement Fund and liability for alleged breaches of trust. The contention is that Long Island City became trustee of the lien on the several lots for the benefit of the certificate holders; and the alleged breaches of trust relied upon are in substance that, through its treasurer and in spite of the protest, the city permitted and authorized sales of land for less than the assessment in violation of the Act of 1874; that instead of cancelling certificates received in payment of assessments and of the purchase price at sales, it reissued the same; and that even where sales had been made for less than the amount of the assessments it allowed redemption from sales in certificates at par and interest. The City of New York is made defendant on the ground that in 1898 Long Island City was merged into it by the Greater New York Act and that the consolidated corporation assumed the obligations and liabilities of the constituent municipalities. Laws N. Y. 1897, c. 378.

Protest was made by plaintiff at time of sales against the course pursued by the treasurer, but he justified the action complained of, relying upon the Act of 1874 and c. 501 of the Laws of 1879 and c. 656 of the Laws of 1886. Writs of mandamus had previously been issued compelling him to receive certificates at par and interest even in payment for the redemption of land sold for non-payment of assessments. *People ex rel. Ryan* v. *Bleckwenn* 8 N. Y. Supp. 638; *People ex rel. Oakley* v. *Bleckwenn*, 13 N. Y. Supp. 487; *People ex rel. Oakley* v. *Bleckwenn*, 126 N. Y. 310. But plaintiff contended that, in view of § 23 of Title VI of c. 461 of the Laws of 1871, if the Acts of 1879 and 1886 were construed as authorizing the action of which he complains, they impair, in violation of the

Federal Constitution, the obligation of contracts previously entered into with certificate holders. The case was fully heard in the District Court on evidence, and several distinct defenses were relied upon. The city insisted, among other things, that the statutory lien did not impose a statutory trust upon it; that the persons who acted were not its agents, but independent officers, agents of the State; that the specific provision of the statute relied upon by plaintiff did not constitute terms of the contract but related merely to the remedy; and that the later legislation introduced, at most, permissible changes of remedy. The court, without passing upon these questions, entered a decree dismissing the bill on the ground that the statute of limitations and laches constituted a complete defense. 235 Fed. Rep. 258. This decree was affirmed by the Circuit Court of Appeals on the same grounds. 247 Fed. Rep. 758. Benedict is a citizen of Connecticut; but as he invoked the jurisdiction of the Circuit Court not only on the ground of diversity of citizenship but also because of rights asserted under the Federal Constitution, his further appeal to this court was permissible. *Vicksburg* v. *Henson*, 231 U. S. 259, 267–268.

The whole case is here for review; but we find it unnecessary to decide most of the questions presented; because we are of opinion that the lower courts did not err in holding that the suit was barred by laches. None of the acts relied upon here as constituting breaches of trust occurred later than the years 1892 and 1893. Before the principal action complained of was taken, the city treasurer publicly announced his purpose to pursue the course complained of, which he asserted was in accordance with law. Plaintiff was represented at the sales by an agent who protested there orally and elsewhere in writing against the treasurer's declared purpose and against specific acts now complained of, asserting then

as now that the course pursued was illegal. We have here a definite repudiation of the alleged trust duties more than 17 years before the institution of this suit. And there are no circumstances which excuse the delay. What occurred in the interval, so far as appears, was this:

(a) In June, 1893, Benedict commenced in the Circuit Court of the United States for the Eastern District of New York a suit in equity to restrain the treasurer from receiving certificates from property owners when redeeming their properties from assessment sales, made to the complainant, and from marking upon the books as paid any assessment upon such property when it was sold for less than the amount of the assessment. It seems that hearing on the motion was adjourned to a later date, and that a restraining order issued which the plaintiff alleges was never observed. It is not shown that any other proceeding was ever taken in the suit.

(b) On May 9, 1904 (at whose instance does not clearly appear), the legislature enacted a statute (Laws N. Y. 1904, c. 686) entitled "an Act to authorize the comptroller and corporation counsel of the city of New York on behalf of said city to compromise and settle with property owners interested, certain claims for taxes, assessments and sales for the same, and for or on account of evidences of indebtedness issued on account of local improvements in the territory formerly included within the boundaries of Long Island City."

(c) On February 21, 1905, plaintiff filed with the comptroller of the City of New York an offer to sell to the city by way of compromise certificates held.

(d) On May 26, 1909, plaintiff's present counsel, acting on behalf of the holders of two hundred and eighty-three certificates, presented to the comptroller a memorial and statement of facts, in which he requested "that provision should be made in some way for the payment of the amount due" on the certificates.

(e) Under date of March 19, 1910, plaintiff presented to the comptroller a similar memorial which he requested should be submitted for determination to the board of estimate and apportionment, in view of the fact that chapter 601 of the Laws of New York of 1907 provided that the comptroller may do so where he believes that, for any reason, a claim against the city is not valid legally, but in equity, justice, and fairness the same should be paid, the city having been benefited by the acts performed and the claim not being barred by the statute of limitations.

(f) On April 26, 1910, a formal request was made upon the deputy comptroller.

Under the law of New York the alleged cause of action would have been subject, if not to the six year statute of limitations, (New York Code of Civil Procedure, § 382), then to the ten year statute of limitations, (New York Code of Civil Procedure, § 388), governing bills for relief in case of the existence of a trust not cognizable by the courts of common law. *Clarke* v. *Boorman's Executors*, 18 Wall. 493. If the Act of 1874 created an express trust, the statute of limitations would not begin to run until there had been a repudiation of the trust. *New Orleans* v. *Warner*, 175 U. S. 120, 130. Here there was an open repudiation of the trust duties which the plaintiff now seeks to enforce. And 17 years were allowed to elapse after that repudiation before this suit was begun and more than ten years before any attempt was made to secure some settlement by negotiation; and there clearly was no waiver of the statute. While it is true that federal courts sitting in equity are not bound by state statutes of limitations (*Kirby* v. *Lake Shore & Michigan Southern Railroad*, 120 U. S. 130), they are, under ordinary circumstances, guided by them in determining their action on stale claims. *Godden* v. *Kimmell*, 99 U. S. 201, 210; *Philippi* v. *Philippe*, 115 U. S. 151; *Pearsall* v. *Smith*, 149

U. S. 231; *Alsop* v. *Riker*, 155 U. S. 448. Compare *Sullivan* v. *Portland & Kennebec R. R. Co.*, 94 U. S. 806, 811. Between 1892 and 1905 plaintiff did nothing to enforce his alleged rights except to commence in 1893 a suit which he did not prosecute. His lack of diligence is wholly unexcused; and both the nature of the claim and the situation of the parties was such as to call for diligence. The lower courts did not err in sustaining the defense of laches.

Decree affirmed.

UNITED STATES *v.* BABCOCK.

UNITED STATES *v.* HAYDEN.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 708, 915. Argued April 15, 1919.—Decided June 2, 1919.

The Act of March 3, 1885, c. 335, 23 Stat. 350, authorizing payment, after examination and determination by the accounting officers of the Treasury, of claims for property belonging to officers and enlisted men and lost or destroyed in the military service under certain circumstances, provides "that any claim which shall be presented and acted on under authority of this act shall be held as finally determined, and shall never thereafter be reopened or considered." *Held*, that this proviso clearly confers exclusive and final jurisdiction on the Treasury Department, so that claims under the act are not within the jurisdiction of the Court of Claims. P. 331. *United States* v. *Laughlin*, 249 U. S. 440, distinguished.

Under the Acts of January 9, 1883, c. 15, 22 Stat. 401, and August 13, 1888, c. 868, 25 Stat. 437, the right to present claims for the loss, etc., of horses in the military service, under § 3482, Rev. Stats., as amended by the Act of June 22, 1874, c. 395, 18 Stat. 193, expired in 1891. *Id.*

53 Ct. Clms. 629; 54 *id.* 1, reversed.

THE cases are stated in the opinion.

Mr. Assistant Attorney General Frierson for the United States.

Mr. George A. King, with whom *Mr. William B. King* and *Mr. William E. Harvey* were on the briefs, for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

These cases, which were argued together, are appeals by the United States from judgments entered in the Court of Claims. In each an officer in the army recovered compensation under the Act of March 3, 1885, c. 335, 23 Stat. 350, for the loss, while in the service, without fault or negligence on his part, of privately owned personal property. In each case the claim had been duly presented within two years of the occurrence of the loss, and the Secretary of War had decided that the articles in question were "reasonable, useful, necessary, and proper for" such officer "while in quarters, engaged in the public service, in line of duty."

In the Babcock case the horse of a captain stationed at the Presidio died in 1910 of strangulation because the Government furnished as the forage ration barley with the awns on it. In the Hayden case, a lieutenant stationed at Texas City, Texas, lost in 1915 his personal effects during a hurricane and inundation, while he was endeavoring to save the property of the Government and of others as well as his own. The claim for the horse had been disallowed by the Auditor of the War Department on the ground that "the death of officer's horse was not caused by any exigency of the service, nor from a cause incident to or produced by the military service." He had disallowed the claim for the personal effects because "the

property was not lost or destroyed by being shipped on an unseaworthy vessel, nor by reason of the claimant giving his attention to saving property belonging to the United States"; and the Auditor's decision was affirmed on appeal by the Comptroller of the Treasury. The Auditor made no finding as to the value of the property lost. This was fixed by the Court of Claims at $200 for the horse and $333 for the personal effects; and for these amounts it entered judgments on the authority of *Newcomber* v. *United States*, 51 Ct. Clms. 408, and *Andrews* v. *United States*, 52 Ct. Clms. 373. The loss in each case occurred prior to April 5, 1917, so that the rights of the parties are not affected by the provisions of the Act of March 28, 1918, c. 28, 40 Stat. 459, 479–480; or Chapter VI of the Act of July 9, 1918, c. 143, 40 Stat. 845, 880–1.

The questions whether the Act of March 3, 1885, authorizes recovery for horses under any circumstances and under what circumstances it authorizes recovery for other personal property have long been the subject of controversy in the Auditing Department and in that of the Comptroller of the Treasury. See 20 Decisions of the Comptroller, 238. But here we are confronted with the preliminary enquiry: Has Congress conferred upon the Court of Claims jurisdiction to determine in any case whether recovery may be had under that statute for an article lost or destroyed? The right asserted is based upon the provision which declares, "That the proper accounting officers of the Treasury be, and they are hereby, authorized and directed to examine into, ascertain, and determine the value of the private property belonging to officers and enlisted men in the military service of the United States which has been, or may hereafter be, lost or destroyed in the military service, under the following circumstances: . . .", and that "the amount of such loss so ascertained and determined shall be paid out of any money in the Treasury not otherwise

appropriated, and shall be in full for all such loss or damage."

These general rules are well settled: (1) That the United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy through the courts. *United States ex rel. Dunlap* v. *Black*, 128 U. S. 40; *Ex parte Atocha*, 17 Wall. 439; *Gordon* v. *United States*, 7 Wall. 188, 195; *DeGroot* v. *United States*, 5 Wall. 419, 431–433; *Comegys* v. *Vasse*, 1 Pet. 193, 212. (2) That where a statute creates a right and provides a special remedy, that remedy is exclusive. *Wilder Manufacturing Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 174–175; *Arnson* v. *Murphy*, 109 U. S. 238; *Barnet* v. *National Bank*, 98 U. S. 555, 558; *Farmers' & Mechanics' National Bank* v. *Dearing*, 91 U. S. 29, 35. Still the fact that the right and the remedy are thus intertwined might not, if the provision stood alone, require us to hold that the remedy expressly given excludes a right of review by the Court of Claims, where the decision of the special tribunal involved no disputed question of fact and the denial of compensation was rested wholly upon the construction of the act. See *Medbury* v. *United States*, 173 U. S. 492, 498; *Parish* v. *MacVeagh*, 214 U. S. 124; *McLean* v. *United States*, 226 U. S. 374; *United States* v. *Laughlin*, 249 U. S. 440. But here Congress has provided, "That any claim which shall be presented and acted on under authority of this act shall be held as finally determined, and shall never thereafter be reopened or considered." These words express clearly the intention to confer upon the Treasury Department exclusive jurisdiction and to make its decision final. The case of *United States* v. *Harmon*, 147 U. S. 268, strongly relied upon by claimants, has no application. Compare *D. M. Ferry & Co.* v. *United States*, 85 Fed. Rep. 550, 557.

In the Babcock case claimant insists also that § 3482 of the Revised Statutes, as amended by Act of June 22,

1874, c. 395, 18 Stat. 193, affords a basis for the recovery. That section provided for reimbursement for horses lost in the military service, among other things "in consequence of the United States failing to supply sufficient forage." The 1874 amendment provided for reimbursement in any case "where the loss resulted from any exigency or necessity of the military service, unless it was caused by the fault or negligence of such officers or enlisted men." Even if these statutes were applicable to facts like those presented here, there could be no recovery; because under the Acts of January 9, 1883, c. 15, 22 Stat. 401, and August 13, 1888, c. 868, 25 Stat. 437, the right to present claims under § 3482 of the Revised Statutes as amended finally expired in 1891. See *Griffis* v. *United States*, 52 Ct. Clms. 1, 170.

The Court of Claims was without jurisdiction in either case, and the judgments are

Reversed.

NORTHERN PACIFIC RAILWAY COMPANY ET AL. *v.* PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 327. Argued April 28, 1919.—Decided June 2, 1919.

A railroad company by constructing its road gains no vested right to the retention of a general rule of law, then in existence, laying the expense of installing and maintaining required safety devices, where one railroad exercises its right to cross another, upon the company making the crossing; and it is not deprived of its property without due process by a change of the rule under which it is required to share such expense equally with a junior company. P. 335.

94 Washington, 10; 97 *id.* 701, affirmed.

THE case is stated in the opinion.

Mr. Lorenzo B. da Ponte, with whom *Mr. Charles W. Bunn*, *Mr. Charles Donnelly*, *Mr. W. V. Tanner*, Attorney General of the State of Washington, and *Mr. Hance H. Cleland*, Assistant Attorney General of the State of Washington, were on the briefs, for plaintiffs in error.

Mr. Heman H. Field, with whom *Mr. Burton Hanson* and *Mr. F. M. Dudley* were on the brief, for defendant in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

The defendant in error, Puget Sound & Willapa Harbor Railway Company, hereinafter designated the Willapa Company, a railroad corporation organized under the laws of the State of Washington, in the construction of a new line of railroad in 1914, found it necessary to cross at grade, at two places, tracks which had been constructed in 1890–1892 by the plaintiff in error, Northern Pacific Railway Company, hereinafter designated the Pacific Company, a corporation organized under the laws of the State of Wisconsin.

In appropriate proceedings, provided for by the state law, the Public Service Commission of the State of Washington granted authority and permission to the Willapa Company to cross the tracks of the Pacific Company at grade at the two designated places. This permission was subject to the condition that suitable interlocking devices, of a type to be agreed upon between the two companies, should be installed at the crossings. The companies agreed upon all of the conditions involved in the crossing of their tracks, excepting as to the cost of installing and maintaining the required interlocking devices,

and upon due submission of this question to the commission it was decided that the entire expense should be borne by the junior, the Willapa Company. The Superior Court affirmed this holding by the commission, but on appeal the Supreme Court of the State, in the decision which we are reviewing, reversed the two lower tribunals and ruled that the expense should be divided equally between the two companies.

The decision of the Supreme Court of Washington is based upon the interpretation which it placed upon applicable state statutes enacted in 1913 (c. 30, Laws of Washington, 1913, p. 74), and the case is presented to this court on the single assignment of error:

"The State Supreme Court erred in holding and deciding that Chapter 30 of the Laws of 1913, as construed and applied to the facts of this case, is not repugnant to the Fourteenth Amendment to the Constitution of the United States."

Conceding that the construction placed upon the state statute by the State Supreme Court will be accepted by this court, the contention of the Pacific Company is that when that company entered the State of Washington and constructed its line, an act of the legislature, passed in 1888, was in effect, which gave to railway companies formed under the act the right to cross any other railway theretofore constructed, but subject to conditions which the State Supreme Court held, in 1908, in *State* v. *Northern Pacific Railway Company*, 49 Washington, 78, required the junior company to pay the entire cost of the crossing, including the installing and maintaining of interlocking devices where necessary; that this constituted a vested right of property in the senior company, and that the later statute of 1913, which the Supreme Court held in this case required it to bear one-half of the cost of installing and maintaining the interlocker, deprived it of its property without due process of law.

It is admitted in argument that the act assailed would be validly applicable to apportioning the cost of crossings of highways and railroads regardless of the dates of their construction, (*New York & New England R. R. Co.* v. *Bristol*, 151 U. S. 556; *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago*, 166 U. S. 226), and that it would be valid as applied to crossings of railroad lines constructed prior to its enactment where no contract had been entered into with respect to the protection of the crossing. *Detroit &c. Railway* v. *Osborn*, 189 U. S. 383. But it is contended that it is not a valid law as applied to the case at bar, where the road of the Pacific Company was constructed at a time when the state law imposed the entire cost of the construction and maintenance of the crossing upon the junior company.

Obviously this is a slender thread on which to hang a grave constitutional argument, and it is difficult to treat it seriously.

At most the earlier statute, and the interpretation which the State Supreme Court placed upon it, was a rule of law applicable to the assessment of damages in a proceeding to appropriate a crossing to which a junior company was entitled by the statute. It was no part of the charter of the Pacific Company, which was organized under the Wisconsin law, and that company had no vested right to insist that the rule should not be changed by statute or by court decision. *Pennsylvania R. R. Co.* v. *Miller*, 132 U. S. 75, 83; *Chicago & Alton R. R. Co.* v. *Tranbarger*, 238 U. S. 67, 76; *New York Central R. R. Co.* v. *White*, 243 U. S. 188, 189; and *Chicago & Alton R. R. Co.* v. *McWhirt*, 243 U. S. 422–5.

While this is sufficient to dispose of the case, it may be added that the Act of 1913 was passed in an obviously legitimate and customary exercise of the police power of the State to protect travelers and employees from injury and death at such crossings, and also to protect property in

the custody of the carriers from damage. It has long been settled law that the imposing of uncompensated charges, involved in obeying a law, passed in a reasonable exercise of the police power, is not a taking of property without due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States. *Chicago, Burlington & Quincy R. R. Co.* v. *Nebraska*, 170 U. S. 57, 73, 74; *New Orleans Gas Light Co.* v. *Drainage Commission*, 197 U. S. 453, 461, 462; *Northern Pacific Ry. Co.* v. *Duluth*, 208 U. S. 583, 594; *Chicago & Alton R. R. Co.* v. *Tranbarger*, 238 U. S. 67, 76.

The judgment of the Supreme Court of Washington is *Affirmed.*

MINERALS SEPARATION, LIMITED, ET AL. *v.* BUTTE & SUPERIOR MINING COMPANY, DESIGNATED AS BUTTE & SUPERIOR COPPER COMPANY, LIMITED.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 599. Argued March 19, 1919.—Decided June 2, 1919.

Patent No. 835,120, for improvements in the process of concentrating ores, by means of oils, etc., sustained as to claims Nos. 1, 2, 3, 4 and 12. P. 339. *Minerals Separation, Ltd.*, v. *Hyde*, 242 U. S. 261, approved.

These claims, as now and heretofore upheld by this court, cover the use, in the process, of the oils of the patent in amounts equal to any fraction of one per cent. on the ore. P. 341.

The oils contemplated by the patent include not only pine oil and other oils referred to in the testimony, but not in the patent, as "frothing oils," but also the petroleum products kerosene and fuel oil, which though less efficient are useful in the patented process. P. 344.

Therefore, the use in the process of a combination of pine oil, kerosene and fuel oil in an aggregate amount exceeding the maximum percentage of oil fixed by the claims, *supra*, does not infringe the patent, even though the pine oil used is less than that percentage and would have produced more efficient results if used alone. P. 345.

In respect of the oils to be employed, the patent discloses that when those having "a preferential affinity for metalliferous matter" are used, in quantities amounting to a fraction of one per cent. on the ore, in the manner prescribed, including agitation of the mixture of oil, water and ore, there will be produced a metal-bearing froth, the result of the process; a preliminary test is stated to be necessary to determine "which oily substance yields the proportion of froth or scum desired," but no specific distinction is made among oils of the requisite "preferential affinity"; and it is not "particularly pointed out" in the claims that some may be more useful than others, that some may be successfully used and some not, or that some are "frothing oils" and some are not. *Held*, that to confine the patent by construction to the oils which will in practice produce the desired froth would subordinate the clear description of the claims to an implied and vague description which would leave the whole subject at large to become a field for further experiment, and might cause the claims to fall short of satisfying the patent law. P. 349.

When an inventor comes late into a field, already well developed and approaching more and more nearly to the results achieved by his invention, the patent should be construed strictly but fairly, so as to allow all and no more than the benefit of the discovery which it discloses to the public. P. 345.

The invention must be particularly pointed out and distinctly claimed; the patent cannot be extended beyond the claims, or construed in a manner different from the plain import of their terms. P. 347.

The result of a process, (in this case the metal-bearing froth) is not patentable, but only the means disclosed for achieving it. P. 349.

Evidence that respondent's process was inefficient and wasteful as compared with that of petitioner's patent is pertinent to the question of infringement. P. 353.

A disclaimer, filed under Rev. Stats., §§ 4917, 4922, *held*, not evasive, and, in view of the foreign residence of the patent owners and the difficulty of communication during the War, not "unreasonably neglected or delayed." P. 354.

250 Fed. Rep. 241, reversed in part and affirmed in part.

THE case is stated in the opinion.

Mr. Henry D. Williams and *Mr. Wm. Houston Kenyon*, with whom *Mr. Lindley M. Garrison*, *Mr. Frederic D. McKenney*, *Mr. Garret W. McEnerney* and *Mr. Odell W. McConnell* were on the briefs, for petitioners.

Mr. J. Edgar Bull, with whom *Mr. Thomas F. Sheridan*, *Mr. Frederick P. Fish*, *Mr. Thomas L. Chadbourne*, *Mr. Kurnal R. Babbitt* and *Mr. J. Bruce Kremer* were on the brief, for respondent.

MR. JUSTICE CLARKE delivered the opinion of the court.

This is a suit by the Minerals Separation, Limited, et al., plaintiffs below and petitioners in this court, against the Butte & Superior Mining Company, defendant below and respondent here, to recover for infringement of United States patent No. 835,120, applied for May 29, 1905, and issued November 6, 1906, the validity of which was sustained by this court in *Minerals Separation, Limited*, v. *Hyde*, 242 U. S. 261.

The patent has been so frequently described in court proceedings,[1] that it will suffice to say of it here, in the

[1] *British Ore Concentration Syndicate, Ltd.*, v. *Minerals Separation, Ltd.*, 25 R. P. C. 741.

Minerals Separation, Ltd., v. *British Ore Concentration Syndicate, Ltd.*, 27 R. P. C. 33.

Ore Concentration Company, Ltd., v. *Sulphide Corporation, Ltd.*, Supreme Court, New South Wales, 31 R. P. C. 216, 217.

Ore Concentration Company, Ltd., v. *Sulphide Corporation*, 31 R. P. C. 206, Privy Council British Empire.

Minerals Separation, Ltd., v. *Hyde*, 207 Fed. Rep. 956, (D. C. Montana).

Hyde v. *Minerals Separation, Ltd.*, 214 Fed. Rep. 100, (C. C. A. 9th Circuit).

Minerals Separation, Ltd., v. *Miami Copper Co.*, 237 Fed. Rep. 609, (D. C. Delaware).

Miami Copper Co. v. *Minerals Separation, Ltd.*, 244 Fed. Rep. 752, (C. C. A. 3rd Circuit, including dissenting opinion of Judge Buffington, p. 775).

terms of the specification, that it "relates to improvements in the concentration of ores, the object being to separate metalliferous matter, graphite, and the like, from gangue by means of oils, fatty acids, or other substances which have a preferential affinity for metalliferous matter over gangue."

The patent contains thirteen claims, which, for the purposes of this opinior, may be conveniently grouped as follows:

(1) Numbers 1, 2, 3, 4 and 12, as "fraction of one per cent. claims," because they call for the use of that amount of oil on the ore; (2) Numbers 5, 6, 7, 8 and 13, as "oleic acid claims," because they are limited to the use of oleic acid in a small fraction of one per cent. on the ore,—0.02–0.5 per cent.; (3) Numbers 9, 10 and 11, as "small quantity of oil claims," all three of which were held invalid by the former decision of this court. Only the five "fraction of one per cent. claims," are involved in this case.

The respondent denied the validity of the patent and the claim of infringement.

The lower courts followed the decision by this court and sustained the patent except as to the three "small quantity of oil claims."

The new evidence introduced on the validity issue is meager in amount, and of a character so unsatisfying that we see no reason for modifying our former conclusion.

The chief controversy in the case centers about the claim of infringement based upon the use of oil by the respondent in excess of one per cent. on, (of the weight of), the ore, after the decision of the former case by this court.

The evidence shows, and counsel now admit, that prior to the decision by this court in December, 1916, the respondent used, in its ore concentration operations, various oils in quantities less than one-half of one per cent. on the ore, but that from January 9, 1917, to the time of trial, with the exception of two or three weeks,

it used oils of a composition which we shall discuss later on, in quantities in excess of one per cent. on the ore. In other respects its methods were substantially those of the patent in suit.

On this showing, the District Court found the patent infringed by the respondent, when it used oil in quantities greater than, as well as when it used it in quantities less than, one per cent. on the ore.

The Circuit Court of Appeals held the patent infringed only when the respondent used oil in quantities equal to, or less than, one-half of one per cent. on the ore, and it therefore reversed both of the holdings of the District Court, but allowed recovery for the period when less than one-half of one per cent. of oil on the ore was used.

The Circuit Court of Appeals derived its authority to limit the claims to one-half of one per cent. on the ore from the construction which it placed upon the following clause of the opinion of this court in the former case, viz:

"The patent must be confined to the results obtained by the use of oil within the proportions often described in the testimony and in the claims of the patent as 'critical proportions,' 'amounting to a fraction of one per cent. on the ore.'"

The reasoning which carried two members of the court to their conclusion was, that, as shown by the evidence of the patentees and the argument of their counsel, the amount of oil which is "critical," in the sense of marking the point of transition from the processes of the prior art to the process and discovery of the patent, is one-half of one per cent. of oil on the ore, and that therefore this court, by using the expression quoted, intended to limit the claims, not to a "fraction of one per cent." but to a "fraction of one-half of one per cent. on the ore."

The specification of the patent points out that the proportion of mineral which floats in the form of froth varies with different ores and with different oily substances

used and that simple preliminary tests are necessary to determine which oily substance will yield the best results with each ore. Of this feature of the patent this court said:

"Such variation of treatment must be within the scope of the claims, and the certainty which the law requires in patents is not greater than is reasonable, having regard to their subject-matter. . . . The process is one for dealing with a large class of substances and the range of treatment within the terms of the claims, while leaving something to the skill of persons applying the invention, is clearly sufficiently definite to guide those skilled in the art to its successful application, as the evidence abundantly shows. This satisfies the law."

Thus was it plainly held proper for the patentees to claim a reasonable degree of variation—"within the scope of the claims"—in the amount of oil to be used in the application of their discovery in practice, and that the restricting of the amount to a fraction of one per cent. on the ore was reasonable and lawful.

The two expressions "critical proportions" and "amounting to a fraction of one per cent. on the ore" being used, the former derived from the evidence and the latter from the claims of the patent, obviously, to the extent that they differ—if they differ at all—the language of the claims must rule in determining the rights of the patentees.

While in the former case this court was not called upon, and in its opinion did not attempt, to define the scope of the claims, but was considering the patent only from the point of view of the invention and usefulness of the claimed discovery, nevertheless, the language quoted seems to indicate clearly enough that the opinion of the court then was, as it is declared now to be, that as to the claims here involved the patent extends to and covers the use in the process of oils of the patent, in amounts

equal to any fraction of one per cent. on the ore. The oleic acid claims are in terms limited to 0.02–0.5 per cent. on the ore. The Circuit Court of Appeals fell into error in the interpretation which it placed upon our opinion and its judgment in this respect is reversed.

Since the case must be retried, there remains to be considered the reversal by the Circuit Court of Appeals of the holding by the District Court that the use of oil by the respondent in excess of one per cent. on the ore constituted an infringement of the patent.

As we have said, prior to the former decision by this court, the respondent used in its ore concentration process less than one-half of one per cent. of oil on the ore, and as to such practice infringement is clear, but from January 9th, 1917, to the time of trial, with slight exceptions, it used in excess of one per cent. on the ore, and it is necessary to consider only the operations during this latter period. The oil used during this period was a compound, varying in composition from time to time, but we agree with the District Court in selecting as typical a mixture made up of 18 per cent. of pine oil, and the remainder of petroleum products or derivatives—12 per cent. of kerosene oil, and 70 per cent. of fuel oil. Of this compound there was used 30 pounds to the ton of ore, which would be 1.5 per cent. on the ore. As thus stated, without more, it is obvious that the use of such an amount of oil would not infringe the claims of the patent which limit the oil to be used to a fraction of one per cent. on the ore.

But the contention of the petitioners, approved by the District Court, was, and now is, that kerosene and fuel oil were inert and valueless, if not harmful, as used by the respondent in the process and rendered the recovery less than it would have been if the pine oil only had been used; that they were added solely to carry the content of oil beyond the prescribed fraction of one per

cent. on the ore, in the hope of technically avoiding infringement; and that essentially in its operations the respondent used the process of the patent with .27 of one per cent. of pine oil on the ore, and therefore infringed it.

The respondent replied that it was not true that kerosene and fuel oil were inert and useless, and asserted that they were oils of the patent, "having a preferential affinity for metalliferous matter;" that the patentees by the claims of their patent had limited their exclusive right to the use, in the process, of any oil or oily substance having such an affinity, but in an amount not greater than a fraction of one per cent. on the ore, and that, therefore, the process of the respondent, in which more than one per cent. of oil on the ore was used, did not infringe the patent.

The entire evidence in the *Hyde Case* was introduced on the trial of this case, and whether the petroleum products or derivatives used by the respondent were oils within the scope of the patent must be determined from the record now before us.

It is admitted that petroleum products are "oils having a preferential affinity for metalliferous matter."

In each of the four claims of the "Complete Specification" of the British patent, filed by the same persons who were patentees of the patent in suit, on June 3, 1905, "petrol" is given as an equivalent of oleic acid in the process. This appears in the statement, repeated in each claim, that the ore and acidified water shall be mixed or agitated with "a small proportion of an oily substance such as oleic acid or petrol, amounting to a fraction of one per cent. on the ore." "Petrol" is the name used in England for gasoline.

The claims of the patent in suit which we are considering call for the use in the process of an "oily liquid," "an oily substance," and in the twelfth claim simply of an "oil." These expressions are said by Professor Chandler,

an expert for the petitioners, much relied on in the *Hyde Case* and in this, to include petroleum products.

Higgins, one of the experimenters who discovered the process in suit, and who is much relied upon by the petitioners as an expert witness in both cases, testified as follows in the *Hyde Case*:

"Q. Have you since found it possible to use other oils than oleic acid with the result of producing a froth?

"A. Yes.

"Q. What other oils?

"A. I have obtained satisfactory results by the use of petrol, certain portions of the distillate of crude petroleum, such as Cosmos oil,"

and he said "Cosmos oil" is "a petroleum distillate."

Chapman, an engineer and a witness for the petitioners in the *Hyde Case*, testified that he had obtained good recoveries in the laboratory and in commercial practice, from the ore of the Braden mine, in Chile, using three pounds of Texas fuel oil to one pound of American wood tar oil per ton of ore. Texas fuel oil is petroleum.

Greninger, an engineer employed by one of the petitioners in installing its flotation plants, testified in this case that in a mine in British Columbia he used a mixture of oil, 75% of which was derived from petroleum.

There is much more of the same character from witnesses for the petitioners and the evidence of the respondent is strongly to the effect that petroleum products are useful and efficient and have been widely used in the process in laboratory and commercial practice.

Without quoting more from the record before us, we must conclude that when the patent in suit was obtained, and even until the testimony in the *Hyde Case* was closed in 1912, petroleum products were recognized by the petitioners, and that they are still used, as oils, efficient, and useful in the process of the patent in suit. Much of this evidence is especially impressive because the papers from

which it is derived were written and the witnesses testified before the question as to petroleum, now made in this case, was raised or discussed.

While we thus conclude that petroleum and petroleum products are oils useful in this process of the patent, it is also clear that they are not as highly efficient as pine oil and several other oils and combinations of oils, which, in the nomenclature of the record are called "frothing oils," and also that better results would probably have been obtained by the use of less than one per cent. on the ore, of pine oil alone, than were obtained by the respondent with that oil in combination with the larger amounts of petroleum products. And this presents the further question necessary to a decision of the case, viz:

Does the use of a more efficient, in combination with a less efficient, oil of the patent, constitute infringement, where the former is used in an amount within the limits of the claims but the combined amount is in excess of such limit, and when the amount of the more efficient oil used would probably produce better results from the process than are produced with the combination of oils?

To answer this question requires a consideration of the state of the prior art as it was when the discovery of the patent was made, and of the scope of the claims which we are considering.

It is always difficult to recover the realities of a situation long past, such as we have here, but it is especially difficult when the importance of the discovery has led, as in this case, to extensive improvements in mechanical appliances for utilizing the invention and to large additions to the knowledge of the adaptability to the process of various oils, singly and in combination.

We held in the former case that the patentees came late into the field of ore concentration investigation and that their discovery rests upon a prior art so fully developed that it was "clear from the record that approach was

being made, slowly, but more and more nearly to the result which was reached by the patentees of the process in suit in March, 1905," and that their final step was not a long one.

Such a patent, in such a field of investigation, must be construed strictly, but candidly and fairly, to give to the patentees the full benefit, but not more, of the disclosure of their discovery which is to become a part of the public stock of knowledge upon the expiration of the patent period, and which was the consideration for the grant to them of a patent monopoly.

With the state of the prior art in mind, we come to consider the nature and extent of the disclosures of the patent in suit, but only with respect to the kinds and quantities of oil which may be used in the process.

The specification recites that the invention of the patent relates to an "improvement" upon prior processes employed in ore concentration "by means of oils, fatty acids, or other substances which have a preferential affinity for metalliferous matter over gangue."

Next come the specific disclosures required by the patent law (Rev. Stats., § 4888), which are intended to describe the advance which the patentees claimed to have made from the prior art Cattermole agglomeration of metalliferous matter into granules, which separate from the gangue, and sink to the bottom of the pulp under treatment, to the discovery of the patent in suit, with its metal bearing froth, rising to the surface of the pulp. Here is the essence of the discovery and it is announced in these terms:

"We have found that if the proportion of oily substance be considerably reduced—say to a fraction of one per cent. on the ore—granulation ceases to take place, and after vigorous agitation there is a tendency for a part of the oil-coated metalliferous matter to rise to the surface of the pulp in the form of a froth or scum."

This is followed by the description of three "factors" on which "this tendency is dependent," viz: slight acidification, heat, and fine pulverization of the ore, and then the disclosure concludes with the statement that the proportion of mineral which floats in the form of froth varies with different ores and with different oily substances, and that a simple preliminary test is necessary to determine which oily substance yields the proportion of froth or scum desired.

The only additional statement contained in the specification, which is in the nature of a disclosure, is found in the description of the example of the application of the invention, in which it is stated that the "froth or scum" derives its power of flotation mainly from the inclusion of air-bubbles introduced into the mass by agitation, such bubbles or air-films adhering only to the mineral particles which are coated with oleic acid.

There remain the claims of the patent, in which the act of Congress requires that the patentee shall "particularly point out and distinctly claim the . . . improvement . . . which he claims as his invention or discovery." And of these this court has said in *Keystone Bridge Co.* v. *Phœnix Iron Co.*, 95 U. S. 274, 278:

"But the courts have no right to enlarge a patent beyond the scope of its claim as allowed by the Patent Office. . . . As patents are procured *ex parte*, the public is not bound by them, but the patentees are. And the latter cannot show that their invention is broader than the terms of their claim; or, if broader, they must be held to have surrendered the surplus to the public."

And in *White* v. *Dunbar*, 119 U. S. 47, 52:

"The claim is a statutory requirement, prescribed for the very purpose of making the patentee define precisely what his invention is; and it is unjust to the public, as well as an evasion of the law, to construe it in a manner different from the plain import of its terms."

And see *Motion Picture Patents Co.* v. *Universal Film Co.*, 243 U. S. 502, 510.

Since we are concerned only with the five "fraction of one per cent. claims," and since the question we are discussing relates only to the use of petroleum products, we need consider them only with respect to the amount and character of the oil prescribed, and, as they are substantially identical, we quote the first as typical:

"The herein-described process of concentrating ores which consists in mixing powdered ore with water, adding a small proportion of oily liquid having a preferential affinity for metalliferous matter, (amounting to a fraction of one per cent. on the ore), agitating the mixture until the oil-coated mineral matter forms into a froth, and separating the froth from the remainder by flotation."

The first three claims declare that, so far as oil is concerned, the discovery resides or consists in "adding a small proportion of an oily liquid having a preferential affinity for metalliferous matter, (amounting to a fraction of one per cent. on the ore);" the fourth claim differs only in substituting the word "substance" for "liquid" in the first three; and the twelfth claim provides for carrying out the process with "oil in water containing a fraction of one per cent. of oil on the ore."

From this consideration of the terms of the patent as written, it is apparent that it makes no differentiation whatever, either in the claims or in the specification, among the oils having a preferential affinity for metalliferous matter, and that its disclosure, to which the petitioners must be limited, is, that when a fraction of one per cent. on the ore of any such oil is used in the manner prescribed, there will be produced a metal-bearing froth, the result of the process. No notice is given to the public, and it is nowhere "particularly pointed out" in the claims, that some oils or combination of oils, having a preferential affinity for metalliferous matter, are more

useful than others in the process, or that some may be used successfully and some not, or that some are "frothing oils," a designation not appearing in the patent, and that some are not. The patentees discovered the described process for producing the result or effect, the metal-bearing forth, but they did not invent that result or froth, —their patent is on the process, it is not and cannot be on the result,—and the scope of their right is limited to the means they have devised and described as constituting the process. *Corning* v. *Burden*, 15 How. 252, 268; *LeRoy* v. *Tatham*, 14 How. 156, 175; *Fuller* v. *Yentzer*, 94 U. S. 288; Robinson on Patents, § 149.

The patent in suit was applied for in this country on May 29, 1905, within a few weeks after the discovery which it embodies was made, and whether, from haste or lack of investigation, from the necessity of meeting the exigencies imposed by the prior art or from a desire to make the claims as comprehensive as possible, this discussion of its terms makes it clear, that the only disclosure as to the kind and amount of oil which the patentees made to the public as necessary to the practicing of their process is that it must be an oil or oily substance, or oily liquid having a "preferential affinity for metalliferous matter," and that it shall be limited in amount "to a fraction of one per cent. on the ore."

It is argued that the provision of the claims that the mixture prescribed, of oil, water and ore, shall be agitated until the oil-coated mineral matter forms into a froth, serves to differentiate the "frothing oils" from others having the required preferential affinity for metalliferous matter but which, when agitated in the mixtures, may not produce the characteristic froth, if any such there are, and that a proper construction of the patent limits it to such "frothing oils" and renders the use of them in a fraction of one per cent. on the ore an infringement when used with "non-frothing oils" having the required affinity in

amounts sufficient to make the combination exceed the quantity limit of the patent.

To give such a construction to the patent would subordinate the clear description contained in it of what are oils of the process, to an implied and vague description and classification which would leave the whole subject again at large, to become a field for further experimentation, without definition in the patent of what oils or froths would satisfy it. So interpreted the patent could not reasonably be said to contain a disclosure of the discovered process in the "full, clear, concise, and exact terms" required by law (Rev. Stats., § 4888) and the claims might conceivably be said to fall short of "particularly pointing out and distinctly claiming" any discovery at all within the meaning of the act of Congress.

Thus when to our former conclusion that the respondent used an efficient oil of the patent, we add the further conclusion, derived from a study of its terms, that the patentees failed to differentiate among the oils described in the patent, we must conclude that it is impossible for the courts to distinguish among them, as more or less efficient in the process, without amending the claims of the patent, and this they are powerless to do.

We are confirmed in the conclusion thus arrived at by the evidence which the patentees in the *Hyde Case*, petitioners in this, introduced to show that their discovered process could not be made operative when more than a fraction of one per cent. of oil on the ore was used, and that the use of a greater amount would not produce the typical froth which results from it,—this without differentiation among the oils described in the patent, save as to their varying adaptability to different ores.

Thus, Ballantyne, a metallurgist and the patent agent who prepared the patent specifications for the petitioners, when called by them as an expert witness, testifies to intimate relations with the patentees and with their in-

vestigations before and since the patented discovery was made, and says:

"I have never seen the agitation-froth process successfully carried out by the use of an amount of oil equal to practically one per cent. by weight on the ore, and in my opinion 0.9999 per cent. of oil would not be a proper quantity (that is to say it would not be a suitable and economical quantity), as contemplated by the patent, and would not, therefore, be a suitable fraction of one per cent., as contemplated by the patent."

Liebmann, an expert much relied upon by the petitioners, testified:

"Q. I understand from your answer . . . that you have never, in your operations, . . . obtained any floating mineral-bearing froth when using an amount of oil or other selective agents amounting to more than one per cent. by weight of the ore. In order that there may be no misunderstanding, will you state whether I have understood you rightly?

"A. That is my recollection."

John Ballot, one of the patentees, testified that he had never seen a froth of the character produced by the patent in suit using a pulp containing more than one per cent. of oil.

There is much more of similar import in the record. This, however, will suffice, adding only the record of a remarkable incident which occurred in this court during the argument of the *Hyde Case* by Mr. Kenyon for the petitioners:

"Mr. Justice McReynolds: I would like to ask you when in this process of reducing oil your invention came into existence?

"Mr. Kenyon: At about one-half of one per cent. of oil.

"Mr. Justice McReynolds: Before you got to the one-half of one per cent. did you have any invention?

"Mr. Kenyon: We were passing from the region of Cattermole, which was a distinct—

"Mr. Justice McReynolds: I want to know when your invention came into existence?

"Mr. Kenyon: This invention was not reached, I should say, from those figures, until about .5, that is one-half of one per cent. of oil was reached.

"Mr. Justice McReynolds: At one per cent. you had no invention?

"Mr. Kenyon: No.

"Mr. Justice McReynolds: At one-half of one per cent. you did have invention?

"Mr. Kenyon: It began to come. Remote, but it began to come. At .3 of one per cent. the float vastly increased. At .1 of one per cent. the float again vastly increased.

"Mr. Justice McReynolds: When this float has more than one-half of one per cent. of oil it does not infringe?

"Mr. Kenyon: It does not infringe.

"Mr. Justice Pitney: What have you to say in answer to what Mr. Scott said the other day to the effect that 1.8 per cent., or perhaps more, of oil, would give the same result with increased agitation?

"Mr. Williams: Absolutely no.

"Mr. Kenyon: It would not."

While parties should not be held rigidly to statements made by their counsel in the stress of argument, even when replying to questions from members of the court, nevertheless these statements from leading counsel in charge of the *Hyde Case* and of this case, are impressive and significant.

This and much more of like character in the record brings us unhesitatingly to the conclusion that the scope we have given to the patent, based upon an interpretation of the language of the claims, is justified also by the evidence in the case and that it is, in fact, that which the petitioners and their counsel, until very recently, placed

upon it in full confidence, that the essence of the discovery lay to such an extent in the use of a small amount of oil, such as is described in the patent, that the result could not be obtained with more than a fraction of one per cent. on the ore.

It must be added that the evidence is far from satisfying that the results of the respondent's process was, in fact, that peculiarly superior quality of metal-bearing froth characteristic of the patented process when worked with a fraction of one per cent. on the ore. The evidence, otherwise doubtful on the point, is rendered especially so by the testimony introduced by the petitioners, and not contradicted, that a computation on the basis of the tonnage of ore treated by the respondent shows that if the process as practiced by it after January 9, 1917, had been used through the year it would have involved a loss of over a million dollars in increased cost of oil and in diminished recoveries, as compared with what the results of operation would have been for the same time using the process of the patent as practiced by the petitioners. It is difficult to see how a process so wasteful and inefficient as that of the respondent is thus proved to be can be other than substantially different from that of the petitioners.

It is vaguely suggested in the testimony for the petitioners that there was some peculiarity in the composition of the ore of the respondent, or in the treatment of it, which resulted in the presence of "clayey gangue slimes" which absorbed an unusual quantity of oil and that this contributed to render it possible to produce the results of the patented process when more than the prescribed fraction of one per cent. of oil on the ore was used.

It is hard to see how this, if true, would be of value to the petitioners, but the evidence is quite too indefinite in character and meagre in extent to be accepted as the basis for the judicial determination of such a claim.

The respondent contends that the disclaimer filed by

the petitioners with respect to the three claims held invalid by the decision of this court in the former case, was so delayed and is so evasive in form that it is invalid and that, for this reason, the petitioners should not be permitted to further prosecute this suit, under the provisions of Rev. Stats., §§ 4917, 4922.

The decision holding the three claims invalid was rendered on December 11th, 1916, and the disclaimer was recorded on the 28th day of March, 1917. Having regard to the fact that the owners of the patent in suit resided in a foreign country, and to the war-time conditions of communication then prevailing, the entry required by law was not "unreasonably neglected or delayed." While the wording of the disclaimer borders on finesse, we do not think it can be interpreted as giving any rights under the patent greater than may be legitimately obtained under the claims held valid, and we therefore deem it sufficient to meet the requirements of the statutes cited.

It results that the decree of the Circuit Court of Appeals that the respondent infringed the patent only when using one-half of one per cent. or less of oil on the ore must be reversed, but that its implied holding that the use made by respondent of petroleum products and pine oil in excess of one per cent. on the ore did not constitute infringement must be sustained. The cause is remanded to the District Court for further proceedings in conformity with this opinion.

Reversed in part.

Counsel for Parties.

F. VITELLI & SON *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

Nos. 67, 68. Argued April 24, 1919.—Decided June 9, 1919.

The Act of June 22, 1874, 18 Stat. 190, § 21, provides that whenever duties have been liquidated and paid and the goods delivered, the entry and settlement shall, after one year from the time of entry, in the absence of fraud and of protest by the owner, etc., be final and conclusive upon all parties. *Held*, that the purpose was to limit the right to reliquidate, in the interest of the citizen and the security of commercial transactions; and where the collector reliquidates on the ground of fraud, it cannot be presumed that his action was correct so as to cast the onus of disproving fraud upon the importer. P. 357.

The fact that the importer, instead of awaiting suit by the United States, becomes the actor by paying under protest and appealing to the Board of General Appraisers, does not require him to assume the burden of disproving the fraud. P. 358.

The Court of Customs Appeals having erroneously assumed, in sustaining a reliquidation based on fraud, that the collector's action was presumptively correct, and cast the burden of disproving fraud upon the importers, *held* that the case must be remanded to be tried anew by the Board of General Appraisers, without inquiry by this court into the adequacy of the evidence of fraud in the present record. P. 359.

7 Cust. App. Rep. 243, reversed.

THE case is stated in the opinion. For the decisions of the Board of General Appraisers, see G. A. 7418; 24 T. D. 75; and Abstracts Nos. 36340, 36544, 27 T. D. 162, 213.

Mr. Albert M. Yuzzolino for petitioner.

Mr. Assistant Attorney General Hanson for the United States.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The petitioners, Vitelli & Son, during the years 1905–6–7, made entry at the port of New York of nineteen different lots of dutiable merchandise, that is, chestnuts and garlic, and these entries were liquidated and the duties paid. About five years after the last of these payments the collector of the port of New York, declaring that evidence had been produced to his satisfaction showing that fourteen of the nineteen entries referred to were fraudulent because of the incorrect weights upon which they were based, canceled the previous liquidations relating to them and directed a reliquidation to be made on the basis of the corrected weights. Vitelli & Son, denying the existence of fraud and disputing the power to make the reliquidation, protested against the claim of duty which resulted from the reliquidation and, paying the same under protest, prosecuted an appeal to the Board of General Appraisers.

Before the board the collector made no affirmative proof of the commission of fraud, and submitted the validity of the reliquidation upon the basis of the official papers pertaining to it, that is, the certificates of weight, etc., upon which he had acted. The petitioners, not taking upon themselves the burden of showing that there was an absence of fraud, stood upon their protest as to the want of power to make the reliquidation. The board sustained the protest. It held that as, under the conditions disclosed, the existence of power in the collector to make the reliquidation after one year depended upon the fact of fraud, the burden was upon the collector to establish that which was necessary to sustain his authority to act, and having failed to do so the reliquidation was erroneous and the protest was well founded. Appeal was prosecuted to the Court of Customs Appeals, where the action of the board was reversed. 5 Cust. App.

Rep. 151. The court held that although it was true that, as applied to the case before it, the existence of fraud was essential to confer upon the collector the power which he had exerted, as he had exercised the authority, the presumption of the correctness of official action was sufficient, without proof of fraud to sustain the reliquidation. In reaching this conclusion it was expressly decided that, in view of the presumption of power indulged in, the effect of § 21 of the Act of 1874 was to cast upon the importer the burden of establishing a negative, that is, that there had been no fraud. The case was remanded for reconsideration to the Board of General Appraisers.

While the protest concerning the fourteen entries was pending, the collector had, for like alleged fraud, ordered a reliquidation of the remaining five of the nineteen entries, and by protest and payment of duties the action of the collector as to those entries was before the Board of General Appraisers for consideration. They were heard by the board along with the entries which the board had under consideration by virtue of the remanding order of the Court of Customs Appeals. The board held, in view of the ruling of the Court of Customs Appeals as to the presumption of power and burden of proof, that the reliquidation in both cases was valid and that the protests were consequently without merit. Both cases were then appealed to the Court of Customs Appeals, which in an elaborate opinion reiterated and applied its previous ruling (7 Cust. App. Rep. 243), and the cases are here on the allowance of a certiorari.

Obviously the whole case turns upon the significance of § 21 of the Act of 1874, the text of which is as follows (18 Stat. 186, 190):

"That whenever any goods, wares, and merchandise shall have been entered and passed free of duty, and whenever duties upon any imported goods, wares, and merchandise shall have been liquidated and paid, and

such goods, wares, and merchandise shall have been delivered to the owner, importer, agent, or consignee, such entry and passage free of duty and such settlement of duties shall, after the expiration of one year from the time of entry, in the absence of fraud and in the absence of protest by the owner, importer, agent, or consignee, be final and conclusive upon all parties."

Indisputable also is it, as stated by the Court of Customs Appeals and long previously pointed out in *United States* v. *Phelps*, 17 Blatchf. 312, that the remedy intended to be accomplished by the section in question was to prevent the right to reliquidate, which had previously been exerted without limit, from being exercised except in the particular conditions stated, and thus in the interest of the citizen to circumscribe the power to the instances specified in order that uncertainty as to the finality of customs entries might be removed and the security of commercial transactions be safeguarded. But from this premise we are of opinion that the error of the construction given to the statute below becomes at once apparent, since, in the first place, by a presumption of power it virtually removes the limitation as to the exercise of the power which the statute created; and further, as the necessary result of the onus of proof which the construction sustained, the remedial purposes of the statute were either wholly negatived or in any event greatly perverted.

It is indeed true that in the opinion on the first hearing below and in the argument at bar a suggestion was made that, as in the particular instance the importer had become an actor seeking to question the reliquidation, he thereby, as an actor, assumed the burden of proof as to the absence of fraud which would not have rested upon him under the statute had he refused to pay the duty resulting from the reliquidation and awaited action taken against him by the United States to enforce it. But as the court below expressly declared that the proceeding taken

was appropriate to resist the result of the reliquidation, if illegal, it cannot be that the right to correct the wrong was lost by resort to the remedy appropriate for its correction.

Moreover the proposition can alone rest upon the assumption that the limitation on power which the statute imposed was ephemeral while from the text it is certain that it was permanent and controlling. The cogency of this conclusion stands out in bold relief when it is considered that the remedial purpose of the statute was to protect the citizen from the unlimited power to reliquidate and the uncertainties affecting commercial transactions resulting from the existence of such power. The inevitable result of the argument is to cast upon the citizen the perpetual burden of showing that he had not been guilty of wrong as the only means of escaping the exercise against him of the unlimited power to reliquidate which it was the purpose of the statute to prevent.

It is contended that although it be admitted that the statute was wrongly construed below, nevertheless the reliquidation should be now sustained because there was adequate proof in the record to show the existence of fraud which justified the reliquidation order without reference to the presumption upon which the court below based its conclusion. We do not, however, think this view can be sustained, since the erroneous ruling as to the statute dominates the entire situation and exacts that the question of the existence of the fraud necessary to give rise to the power to reliquidate should be disposed of by the tribunals peculiarly competent to consider such question, disembarrassed from any mistaken construction as to the presumption created by the statute.

It follows that the judgment of the Court of Customs Appeals must be and it is reversed and the cases remanded to the Board of General Appraisers for further proceedings not inconsistent with this opinion.

And it is so ordered.

COMMERCIAL CABLE COMPANY *v.* BURLESON ET AL.

COMMERCIAL PACIFIC CABLE COMPANY *v.* BURLESON ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Nos. 815, 816. Argued March 7, 1919.—Decided June 9, 1919.

Appellants' suits to enjoin the Postmaster General from interfering with their cable properties, upon the ground that requisition of these by the President, followed by assumption of possession and control by the defendant, was in excess or abuse of the power given by the Joint Resolution of July 16, 1918, c. 154, 40 Stat. 904, and not attended by adequate provision for compensation, became moot when, by the President's authority, the properties were restored to them, together with the revenues, admittedly sufficient compensation, derived therefrom during government operation. P. 362.

Apprehension that the alleged wrongs may be repeated and that the revenues may be claimed by the United States, does not preserve the justiciable quality of these cases. *Id.*

The dismissal of the bills by the District Court for want of equity, upon a holding that compensation was adequately provided for, and that the other objections were nonjusticiable, was such a rejection of the appellants' asserted right as necessitates a reversal with directions to dismiss without prejudice and without costs. *Id. United States* v. *Hamburg-American Co.*, 239 U. S. 466.

255 Fed. Rep. 99, reversed.

THE cases are stated in the opinion.

Mr. Charles E. Hughes, with whom *Mr. William W. Cook* was on the briefs, for appellants.

The Solicitor General, with whom *Mr. Assistant to the Attorney General Todd* was on the briefs, for appellees.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

By virtue of the Joint Resolution of July 16, 1918, [c. 154, 40 Stat. 904] considered in the *Dakota Central Telephone Case*, decided June 2, 1919, *ante*, 163, the President, by proclamation dated November 2, 1918, [40 Stat. 1872], assumed control, possession, and supervision "of each and every marine cable system and every part thereof owned or controlled and operated by any company or companies organized and existing under the laws of the United States, or any State thereof."

As in the case of the telephone lines, the proclamation conferred authority upon the Postmaster General to carry out its provisions. In the name of the President, the Postmaster General then took possession and assumed control of the cable lines owned by or under the control of the two companies which are appellants on these records. The companies thereupon filed their bills in the court below to enjoin the Postmaster General or his representatives from interfering with their property because (1) under the circumstances alleged the President had no power to take possession and control of the cable lines; (2) if he had such power, he was not justified in exerting it under the conditions stated, and (3) as the result of the failure to provide adequate compensation, the taking of the cable lines was void for repugnancy to the Constitution. These propositions were based upon elaborate averments concerning the subject-matter. On motion of the defendants the bills were dismissed for want of equity. The court held that as under the facts admitted the first two propositions raised no question of power, but only charged a wrongful exercise of a discretion vested, they stated no ground for relief as the subject was not justiciable, and that as to the third proposition there was no equity in the bill because the pro-

vision made for compensation met the constitutional requirement.

By appeals, the cases were brought here and were argued and submitted in March last. While they were under advisement the United States directed attention to the fact that by authority of the President all the cable lines, with which the two corporations were concerned and to which the bills related, had been turned over to and had been accepted by the corporations and the Government hence had no longer any interest in the controversy. As the result of submitting an inquiry to counsel as to whether the cases had become moot, that result is admitted by the United States, but in a measure is disputed by the appellants for the following reasons: First, it is said that as the taking over of the lines by the President was wholly unwarranted and without any public necessity whatever, there is ground to fear that they may again be wrongfully taken unless these cases now proceed to a decree condemning the original wrong; and second, that although it is true that during the operation of the property while under the control of the Government all the revenues derived from it were separately kept and have been returned to the owners of the property—a result which financially is satisfactory to them—nevertheless, unless there is a decree in this case, the owners can feel no certitude that the revenues may not be claimed from them by the United States in the future.

But we are of opinion that these anticipations of possible danger afford no basis for the suggestion that the cases now present any possible subject for judicial action, and hence it results that they are wholly moot and must be dismissed for that reason. In giving effect, however, to that conclusion, we are of opinion that the decrees below, which in substance rejected the rights asserted by the complainants, ought not to be allowed to stand, but on the contrary, following the well established precedents (*United*

States v. *Hamburg-American Co.*, 239 U. S. 466; *United States* v. *American-Asiatic S. S. Co.*, 242 U. S. 537), the decrees below should be reversed and the cases remanded to the lower court with directions to set aside the decrees and to substitute decrees dismissing the bills without prejudice and without costs, because the controversy which they involve has become moot and is no longer therefore a subject appropriate for judicial action.

And it is so ordered.

LOUISVILLE & NASHVILLE RAILROAD COMPANY *v.* WESTERN UNION TELEGRAPH COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

LOUISVILLE & NASHVILLE RAILROAD COMPANY *v.* WESTERN UNION TELEGRAPH COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

Nos. 176, 248. Argued January 22, 23, 1919.—Decided June 9, 1919.

The Mississippi practice providing for assessment of damages and determination of the right of condemnation in separate proceedings is consistent with due process. P. 365.

Consistently with the Fourteenth Amendment the state law may allow condemnation for maintaining an existing telegraph line as well as for building a new one. *Id.*

And where the judgment in condemnation is for a new line, the state courts may, under the Amendment, reserve inquiry into an alleged purpose to use it for maintaining an existing line, in alleged infraction of the state law, until such use is attempted. *Id.*

A judgment of condemnation for a single telegraph line on a railroad right of way is not void under the Fourteenth Amendment for failure to describe the exact location of the poles, when it requires them to be set so as not to interfere with train operations or the proper use of the right of way by the railroad or by other telegraphs already upon it, or endanger persons or property, and is subject to stipulations binding the condemnor to change its poles, etc., to conform to necessary changes or new construction of tracks. P. 366.

Parts of an interstate railroad right of way and of bridges over navigable waters may be condemned for the use of a telegraph company pursuant to the state law. P. 367.

The Post-Roads Act of July 24, 1866, waived any objection to such exercise of state sovereignty as an interference with interstate commerce, and no other act of Congress prevents. *Id.*

Whether the District Court properly dismissed a bill on the ground of *res judicata*, *held* not necessary to determine where a correct decision on the merits must have resulted the same. *Id.*

An injunction by a federal court forbidding a railroad company to interrupt a telegraph company in the use of its wires on the railroad right of way during a certain period or until the telegraph company could condemn, *held* binding on the federal court of another circuit. P. 368.

233 Fed. Rep. 82; 107 Mississippi, 626, affirmed.

THE cases are stated in the opinion.

Mr. Gregory L. Smith, with whom *Mr. Henry L. Stone* was on the brief, for appellant and plaintiff in error.

Mr. Rush Taggart for appellee and defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

These suits, the earlier begun in the District Court of the United States, the later in a Court of the State of Mississippi, are bills in equity containing the same allegations and seeking the same relief. They both seek a decree that state judgments of condemnation by eminent domain, giving to the telegraph company the right to erect its poles along the railroad's right of way across the

State of Mississippi, are void. The state case was decided first and was in favor of the defendant in error. 107 Mississippi, 626. Then in the District Court the telegraph company pleaded the state decree as a conclusive adjudication and moved that the bill and a supplemental bill be dismissed. Against the supplemental bill it also set up an injunction in its favor granted by another Court of the United States, reported in 201 Fed. Rep. 946, and 207 Fed. Rep. 1. The bills were dismissed upon both grounds. 233 Fed. Rep. 82. 147 C. C. A. 152. The constitutional questions raised are presented equally in the state case and as we shall deal with them under that, 107 Mississippi, 626, it may be assumed, subject to those questions, that the other decision was right, as we see no reason to doubt.

The Mississippi proceedings in eminent domain are limited in their effect to determining the amount of damages to be paid. If the right to condemn is disputed that is left to be decided by a suit in equity. *Vinegar Bend Lumber Co.* v. *Oak Grove & Georgetown R. R. Co.*, 89 Mississippi, 84, 105–107, 110, 113. The railroad company resorted to such a bill in this case. So far as it alleged a failure to comply with the state laws the state decision is conclusive against it, and of course it cannot complain of not being given a hearing simply because it is referred for that hearing to a different suit from that in which the value of the property is fixed. The separation is familiar. *United States* v. *Jones*, 109 U. S. 513, 519. Passing these matters by, the first contravention of the Fourteenth Amendment alleged is that under the Mississippi laws the right could be taken only for a new line, whereas the bill avers that the telegraph company wanted the right not for a new line but for the purpose of maintaining an existing line that it had maintained theretofore under a contract with the railroad now brought to an end. To this the Supreme Court replied that, the judgments being

right upon their face, if the telegraph company attempted to use them to maintain an existing line instead of a new one its rights could be determined when the attempt was made. The Fourteenth Amendment knows no difference between the two purposes, and the extent to which the telegraph company is confined to one of them under the state laws is for the State Court to decide. No constitutional right is infringed when the State Court postpones discussion until the attempt is made. The decree as well as the opinion saves the railroad's right in that event.

It is argued that the judgments are void because they do not fix the exact location of the telegraph poles within the specified right of way. But they allow only one line of poles to be set up, and require it to be erected "in such manner and at such distance from defendant's [the railroad's] track as in no way to interfere with the operation of trains of said defendants or with any proper and legitimate use thereof by defendants, or the use by any telegraph or telephone company now existing thereon, and so as not to be dangerous to persons or property, and subject to all the stipulations and agreements in said petition contained." The petition contains an agreement that if, after the erection of the poles, etc., "it should become necessary for the said defendant to change the location of its tracks, or construct new tracks, or side tracks, where the same do not now exist, and for such purpose to use and occupy that portion of said right of way on which petitioner's poles are, or may be set, cross arms placed thereon and wires strung, your petitioner will, at its own expense upon reasonable notice from said defendants, remove said poles, cross arms and wires to such other point, or points, on said defendant's right of way as shall be designated by said defendant." This agreement is binding. *Mobile & Ohio R. R. Co.* v. *Postal Telegraph-Cable Co.*, 76 Mississippi, 731, 752, 753. The description has been held to satisfy the requirements of

state law and it would be extravagant to say that the Fourteenth Amendment made it bad.

It is contended that the State had no power to condemn for the use of the telegraph company any part of the right of way of an interstate road or bridge over navigable waters. Support for the argument is sought in *Western Union Telegraph Co.* v. *Pennsylvania R. R. Co.*, 195 U. S. 540. That case shows, to be sure, that the Act of July 24, 1866, c. 230, 14 Stat. 221; Rev. Stats., § 5263, purporting to grant to any telegraph company the right to construct and maintain lines along the post roads of the United States and to cross navigable streams, did not of itself give the right to appropriate private property. But it equally shows that Congress gave its assent to the acquisition of such rights in post roads by any means otherwise proper, as against any objection that it was an interference with interstate commerce, and such is the implication of the cases. "State sovereignty under the Constitution is not interfered with." *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, 12. *Western Union Telegraph Co.* v. *Richmond*, 224 U. S. 160, 169. *Louisville & Nashville R. R. Co.* v. *Western Union Telegraph Co.*, 207 Fed. Rep. 1, 11, 12. The present decision is enough to establish that the condemnation followed the state law. See also *Cumberland Telephone & Telegraph Co.* v. *Yazoo & Mississippi Valley R. R. Co.*, 90 Mississippi, 686. No act of Congress prevents the state proceedings having their intended effect.

We think it unnecessary to deal with the somewhat meticulous objections to the form in which the Mississippi decree was pleaded and proved in the District Court or to repeat the answer of the defendant in error to the contention that if proved it was not an adjudication. If the bill in the District Court had not been disposed of by the state decree it would be dismissed under our present decision. Two days before the answer setting up the

state decree the railroad filed a supplemental bill alleging that the telegraph company had no longer any rights except under the condemnation proceedings but that it still was using its old line. The telegraph company pleaded in reply an injunction, mentioned above, granted by another Court of the United States, forbidding the railroad to interrupt the telegraph in the use of its wires upon the railroad's right of way, the declared purpose being to preserve the *status quo* for a certain time, or until the condemnation could be carried out. 207 Fed. Rep. 1, 5. If for any reason the supplemental bill does not fall with the bill this earlier action in the Sixth Circuit (while it stands, see 252 Fed. Rep. 29,) properly was regarded as precluding contrary action in the Fifth.

Decrees affirmed.

PENNSYLVANIA RAILROAD COMPANY *v.* MINDS, SURVIVING AND LIQUIDATING PARTNER OF MINDS ET AL., LATELY TRADING AS BULAH COAL COMPANY.

PENNSYLVANIA RAILROAD COMPANY *v.* MINDS ET AL., TRADING AS BULAH COAL COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Nos. 293, 294. Argued April 23, 1919.—Decided June 9, 1919.

In actions upon two closely related reparation orders, *held* that a mistake in the declarations transposing the awards, first discovered by the District Court near the close of the trial, was subject to correction by amendment in that court's discretion. P. 370.

Where a railroad company, guilty of unlawful discrimination in car distribution, for years contested the claims of the injured shippers,

and offered no payment of awards for damages and interest made by the Interstate Commerce Commission, it is not erroneous in actions upon the awards to permit the jury to allow interest in its verdicts, even though the shippers' claims were excessive. P. 370.

In actions on reparation orders, *held* that the District Court did not abuse its discretion in fixing counsel fees, or commit error in its charge as to the cost of producing coal, as an element in the damages. P. 371.

In such an action, where there was expert evidence tending to prove (as in *Pennsylvania R. R. Co.* v. *Jacoby & Co.*, 242 U. S. 89), that the Commission's award was based upon tables of car distribution which if followed in practice would have given the complaining shippers the illegal preference of which they complained, *held* that the railroad was entitled to an instruction that the award should be disregarded if the Commission followed such tables; and that refusal of its request for such instruction would be substantial error notwithstanding there was other evidence as to the damages and the verdict was much less than the award. *Id.*

Where it is obvious from remarks of the trial judge at the close of his charge that he has inadvertently overlooked one of several requests to charge and opportunity is expressly given to suggest the omission, failure to avail of the opportunity waives the error in not granting the request; a general exception to refusals to charge as requested will not suffice. P. 373.

244 Fed. Rep. 53, affirmed.

THE cases are stated in the opinion.

Mr. Francis I. Gowen and *Mr. Frederic D. McKenney*, with whom *Mr. Henry Wolf Biklé* was on the brief, for plaintiff in error.

Mr. James A. Gleason, with whom *Mr. George M. Roads*, *Mr. H. W. Moore* and *Mr. John H. Minds* were on the brief, for defendants in error.

MR. JUSTICE DAY delivered the opinion of the court.

These cases were tried together in the courts below and may be considered and disposed of in like manner here.

They were brought upon reparation orders made by the Interstate Commerce Commission based upon alleged discrimination against the plaintiffs in car distribution. Two periods were in controversy. In No. 293 from July 1, 1902, to October 1, 1904; in No. 294 from October 1, 1904, to June 30, 1907. Verdicts and judgments were recovered in both cases against the Company. The judgments were affirmed in the Circuit Court of Appeals. 244 Fed. Rep. 53.

During the first period James H. Minds and William J. Matz, trading as Bulah Coal Company, operated the mine alleged to have been subjected to unlawful discrimination. During the second period a partnership, composed of Minds and the widow of Matz, trading under the same name, operated the mine. Two proceedings for reparation were brought before the Interstate Commerce Commission. In the first an order of reparation in the sum of $18,591.48 was awarded, with interest thereon at the rate of 6% per annum from June 28, 1907. For the second period an award was made in the sum of $31,715.57 with 6% interest from the same date. The verdicts of the jury were, for the first period, $16,092.92, for the second period $33,618.37.

(1) The plaintiff in error complains of the allowance of an amendment correcting a mistake in the declarations transposing the awards. The mistake was first noticed by the court near the close of the trial. This amendment was so obviously just and within the court's discretion that we need only say that we think no error was committed in allowing it.

(2) It is insisted that the court erred in allowing the jury to add interest not exceeding 6% on the damages found; this upon the theory that the recoveries were below the amounts claimed before the Commission which were so large as to be wholly unfair. But the defendants in error were entitled to full compensation for the damages

sustained as the result of the wrongful discrimination against them. (§ 8 of the Act to Regulate Commerce.) The Commission allowed interest as part of its award, and the District Court charged the jury that it might do so in making up its verdicts. We see no error in this. For years these claims have been contested, the Company never offered any payment of the awards, and unless interest is to be allowed there seems to be no means of making the claimants whole for the wrongs sustained by violations of the statute.

(3) It is contended that the court erred in fixing counsel fees, as only those are allowable which compensate for court services. *Meeker* v. *Lehigh Valley R. R. Co.*, 236 U. S. 412. But we are not prepared to say that the court abused its discretion in fixing the fees. There is nothing to warrant our interference with the judgments in this respect.

(4) Error is alleged in the charge as to the cost of producing the coal which entered into the computation of damages. Upon this point there was a conflict in the testimony, and an examination of the charge satisfies us that the question was fully and fairly left to the jury.

(5) We come to the final and most serious complaint of error in the proceedings. As to the first period there was no contest over the amount of tonnage which the plaintiffs could have shipped had the cars been fairly distributed during that period. As to the second period, the contention is that there was testimony tending to show that the Commission awarded reparation under a rule which violated its own final determination of the correct rule, in the same manner as was shown in *Pennsylvania R. R. Co.* v. *Jacoby & Co.*, 242 U. S. 89, resulting in the reversal of the judgment in that case. There is no showing that the court gave a wrong rule in this respect in its charge to the jury. But here as in the *Jacoby Case*, the Company called an expert witness who testified that the

tables in a blue-print, put in evidence by the complainants before the Commission, were made upon a basis of car distribution, which, if applied to complainants, would result, as pointed out in the *Jacoby Case*, in giving to them the wrongful preference which had been awarded to favored companies. The witness testified that a computation showed that the Commission, in making its award, had followed this erroneous table and had used its percentages as the basis of its award. The record discloses that the Company asked eighteen special points to be given in charge to the jury; in two of which it requested charges which were based on this witness' testimony as to the inaccuracy of the tables, asking the court in substance to say to the jury that, if the Commission used such tables in making its computation, the awards were on a wrong basis and should be disregarded.

The Circuit Court of Appeals answered this contention by distinguishing the *Jacoby Case*—in that the recovery in that case was based wholly upon the award of the Commission and in precisely the same amount, whereas, in this case there was other testimony as to the damages, and the jury awarded a recovery in a sum much less than the amount fixed by the Commission. If these were all the grounds of distinction between this and the *Jacoby Case* we should be constrained to hold that the failure to give the Company's special requests, based on the expert's testimony, was substantial error, requiring a reversal, but at the close of his charge the judge said:

"I think I have gone over the subject matter of all the different points submitted to me. So far as they are affirmed in the general charge, they are affirmed; and so far as not affirmed in the general charge, they are disaffirmed, and counsel if they choose may call my attention to any specific point which they would like to have specifically answered."

The court in its charge had not adverted to the effect

to be given to the testimony of the defendant's expert. The observations, just referred to, called upon counsel to direct the court's attention to points omitted. The plaintiffs' counsel called the court's attention to some things. Counsel for the Company said:

"In the first period we do not dispute the lost tonnage, only the cost. In the second period we dispute the correctness both of plaintiffs' cost figures and also the tonnage. We ask that the court so charge."

The Court responded: "Now, gentlemen, I want to make that clear. In the first period there is no question of the tonnage raised. The defendant concedes the amount of the tonnage, and the difference is all over the cost. So you need not trouble yourselves there with any other question than the cost question. In the second period the claim is questioned in two respects, the cost, just as it is in the first period, and the tonnage is also questioned. So of course you cannot determine the amount of damage until you have settled both of those questions.

"I understand that the parties have agreed that their respective statements of their positions may be sent out in order to save the jury the labor of making calculations? Is that correct?"

Counsel for the plaintiffs and for the Company each answered, "Yes, sir."

The Court: "So, gentlemen, you will have the benefit of the figuring of the parties on each side, which will present their respective views. You will take the case and dispose of it. . . .

"Counsel for the defendant excepted to the refusal of the learned trial judge to charge as requested by them in such points as were not affirmed. (Exception noted for defendant by direction of the court.)"

We have then this situation: After a charge, dealing with the general questions in the case, with numerous

special requests to charge "points," as they are called, the presiding judge expressed the view that he thought he had gone over the subjects embraced in the requests submitted. That he had omitted some is not surprising, for the court was dealing with an exceedingly difficult and complicated situation of car distribution, concerning which the Interstate Commerce Commission, the body primarily entrusted with the determination of such matters, had long deliberated before announcing the rule upon which it finally acted and made its award in the series of cases of which those now before us are a part. Upon the invitation of the trial judge the Company's counsel made the request which we have quoted, and the judge at once complied with it, and charged, as counsel desired, upon that particular subject, adding that he understood that the parties had agreed that the respective statements of their positions might go to the jury to save it the labor of making calculations. In this way the parties got before the jury the calculations showing their respective claims. This may have been and probably was the reason for the failure of counsel to call attention to the omission to answer the particular points requested concerning the effect to be given to the testimony of the defendant's witness, if credited by the jury. Apparently counsel were satisfied when the jury had before it the table showing the basis of their claims in the case. But, whatever the reason, the court after a careful and painstaking charge, thinking he had answered the "points" of both sides, called upon counsel to suggest omissions as to particular points; then followed the proceedings already recited. We think counsel should have directed attention to the omission which it is evident was inadvertent. The case, in this aspect, is entirely unlike the *Jacoby Case*, where a specific request was made and refused, and a recovery had upon an award of the Commission which the testimony tended to show was made upon a wrong basis.

This court has repeatedly held that objections to the charge of a trial judge must be specifically made in order that he may be given an opportunity to correct errors and omissions himself before the same are made the basis of error proceedings; this is the only course fair to the court and the parties. *McDermott* v. *Severe*, 202 U. S. 600, 610; *Norfolk & Western Ry. Co.* v. *Earnest*, 229 U. S. 114, 120; *United States* v. *U. S. Fidelity Co.*, 236 U. S. 512, 529; *Jacobs* v. *Southern Ry. Co.*, 241 U. S. 229, 236; *Guerini Stone Co.* v. *Carlin Construction Co.*, 248 U. S. 334, 338. Parties may not rest content with the procedure of a trial, saving general exceptions to be made the basis of error proceedings, when they might have had all they were entitled to by the action of the trial court had its attention been seasonably called to the matter.

The trial court and the Court of Appeals have refused to disturb the amounts awarded by the jury as compensation for the clear violation of the Interstate Commerce Act, which these records disclose, and which were very much less than the sums awarded by the Commission when the allowance of interest is considered which under the court's instructions entered into the verdicts. We think the only serious ground upon which reversal may be asked is found in the failure to give the points, to which we have referred, and as to them, we are of the opinion that such failure was waived by the course of proceeding to which attention has been directed.

Affirmed.

DEGANAY *v.* LEDERER, COLLECTOR OF INTERNAL REVENUE.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 319. Argued April 23, 1919.—Decided June 9, 1919.

Stocks and bonds issued by domestic corporations, and mortgages secured on domestic real estate, were owned by an alien nonresident but were in the hands of an agent in this country, empowered to sell, assign and transfer any of them and to invest and reinvest the proceeds as it might deem best in the management of the business affairs of the owner. *Held*, that the income was subject to tax under the Income Tax Law of October 3, 1913, c. 16, § II, A, subdiv. 1, 38 Stat. 166, as income from "property owned . . . in the United States by persons residing elsewhere." P. 380.

Bonds, mortgages and certificates of stock are ordinarily regarded as "property"; and that term is presumed to have been used in the statute with its ordinary sense, nothing to the contrary appearing. *Id.*

It is well settled that such property may have a situs for taxation at a place other than the owner's domicile. P. 381.

THE case is stated in the opinion.

Mr. James Wilson Bayard for DeGanay:

Intangible personal property has its situs at the domicile of the owner and, in the absence of special statutory provisions, is not subject to taxation elsewhere. *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *State Tax on Foreign Held Bonds*, 15 Wall. 300; *Tappan* v. *Merchants' National Bank*, 19 Wall. 490; *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194; *Provident Savings Association* v. *Kentucky*, 239 U. S. 103; *Fidelity & Columbia Trust Co.* v. *Louisville*, 245 U. S. 54; *Buck* v. *Beach*, 206 U. S. 392.

There are no special words in this statute which indicate the intent to reach any particular classes of property.

It would follow, therefore, that the words "property owned in the United States" should be taken in their ordinary legal meaning, and that they should not be extended to include intangible property owned by an alien not resident in the United States, because such intangible personal property, under the general rule we have above quoted, has for its *situs* the domicile of that alien nonresident. 30 Op. Atty. Gen. 230; *id.* 273. The provisions of the act should not be extended beyond the clear import of its terms. *Gould* v. *Gould*, 245 U. S. 151. See also the instructions of the Commissioner of Internal Revenue of August 12, 1914, 16 T. D., Int. Rev., 118, and December 28, 1914, *id.* 305, following the above opinions of the Attorney General, and the Revenue Acts of September 8, 1916, § 1, 39 Stat. 756, and February 24, 1919, § 213 (c), 40 Stat. 1057, 1066.

The plaintiff is subject to taxation in the country of her residence and the presumption is against a construction which would result in double taxation.

Mr. Assistant Attorney General Brown, with whom *Mr. W. C. Herron* was on the brief, for Lederer:

The brief reviewed the following cases: *Savings & Loan Society* v. *Multnomah County*, 169 U. S. 421; *State Tax on Foreign Held Bonds*, 15 Wall. 300; *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *United States* v. *Erie Ry. Co.*, 106 U. S. 327; *Railroad Co.* v. *Collector*, 100 U. S. 595; *United States* v. *Railroad Co.*, 17 Wall. 322; *New Orleans* v. *Stempel*, 175 U. S. 309; *Bristol* v. *Washington County*, 177 U. S. 133; *Eidman* v. *Martinez*, 184 U. S. 578; *Blackstone* v. *Miller*, 188 U. S. 189; *Corry* v. *Baltimore*, 196 U. S. 466; *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395; *Buck* v. *Beach*, 206 U. S. 392; *Burke* v. *Wells*, 208 U. S. 14; *Walker* v. *Jack*, 88 Fed. Rep. 576; *Selliger* v. *Kentucky*, 213 U. S. 200; *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194; *Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63; *Liver-*

pool &c. Ins. Co. v. *Orleans Assessors*, 221 U. S. 346; *Hawley* v. *Malden*, 232 U. S. 1; *Wheeler* v. *New York*, 233 U. S. 434; *Rogers* v. *Hennepin County*, 240 U. S. 184; *Bullen* v. *Wisconsin*, 240 U. S. 625; *Fidelity & Columbia Trust Co.* v. *Louisville*, 245 U. S. 54; *Iowa* v. *Slimmer*, 248 U. S. 115; *Willing* v. *Perot*, 5 Rawle, 264; *Attorney General* v. *Bouwens*, 4 M. & W. 171; *Commissioner of Stamps* v. *Hope* [1891], A. C. 476; *New York Breweries Co.* v. *Attorney General* [1899], A. C. 62; *Lecouturier* v. *Ray* [1910], A. C. 262; *Rex* v. *Lovitt* [1911], A. C. 212; *Royal Bank of Canada* v. *Rex* [1913], A. C. 283; *Inland Revenue Commissioners* v. *Muller & Company's Margarine* [1901], A. C. 217.

MR. JUSTICE DAY delivered the opinion of the court.

The Act of October 3, 1913, c. 16, § II, A, subdivision 1, 38 Stat. 166, provides:

"That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum per annum upon such income, except as hereinafter provided; and a like tax shall be assessed, levied, collected, and paid annually upon the entire net income from all property owned and of every business, trade, or profession carried on in the United States by persons residing elsewhere."

Under this statutory provision a question arose as to the taxability of income from certain securities of Emily R. DeGanay, a citizen and resident of France. The District Court of the United States for the Eastern District of Pennsylvania held the income from the securities taxable. 239 Fed. Rep. 568. The case is here upon certificate from the Circuit Court of Appeals, from which it appears: That Emily R. DeGanay is a citizen of France, and re-

sides in that country. That her father was an American citizen domiciled in Pennsylvania, and died in 1885, having devised one-fourth of his residuary estate, consisting of real property, to the Pennsylvania Company for Insurance on Lives and Granting Annuities, in trust to pay the net income thereof to her. She also inherited from her father a large amount of personal property in her own right free from any trust. This personal property is invested in stocks and bonds of corporations organized under laws of the United States and in bonds and mortgages secured upon property in Pennsylvania. Since 1885 the Pennsylvania Company has been acting as her agent under power of attorney, and has invested and reinvested her property, and has collected and remitted to her the net income therefrom. The certificates of stocks, bonds and mortgages had been and were in 1913 in the Company's possession in its offices in Philadelphia. The Company made a return of the income collected for the plaintiff for the year 1913 both from her real estate, which is not in controversy here, and her net income from corporate stocks and bonds and the bonds and mortgages held by her in her own right. The tax was paid under protest and recovery was sought by the proper action.

The question certified is limited to the net income collected by virtue of the power of attorney from the personal property owned by the plaintiff in her own right.

The power of attorney, which is attached to the certificate, authorizes the agent:

"To sell, assign, transfer any stocks, bonds, loans, or other securities now standing or that may hereafter stand in my name on the books of any and all corporations, national, state, municipal or private, to enter satisfaction upon the record of any indenture or mortgage now or hereafter in my name, or to sell and assign the same and to transfer policies of insurance, and the proceeds,

also any other moneys to invest and reinvest in such securities as they may in their discretion deem safe and judicious to hold for my account; to collect and receipt for all interest and dividends, loans, stocks, or other securities now or hereafter belonging to me, to endorse checks payable to my order and to make or enter into any agreement or agreements they may deem necessary and best for my interest in the management of my business and affairs, also to represent me and in my behalf, to vote and act for me at all meetings connected with any company in which I may own stocks or bonds or be interested in any way whatever, with power also as attorney or attorneys under it for that purpose to make and substitute, and to do all lawful acts requisite for effecting the premises, hereby ratifying and confirming all that the said attorney or substitute or substitutes shall do therein by virtue of these presents."

The question certified is: "If an alien non-resident own stocks, bonds, and mortgages secured upon property in the United States or payable by persons or corporations there domiciled; and if the income therefrom is collected for and remitted to such non-resident by an agent domiciled in the United States; and if the agent has physical possession of the certificates of stock, the bonds and the mortgages; is such income subject to an income tax under the Act of October 3d, 1913?"

The question submitted comes to this: Is the income from the stock, bonds and mortgages, held by the Pennsylvania Company, derived from property owned in the United States? A learned argument is made to the effect that the stock certificates, bonds and mortgages are not property, that they are but evidences of the ownership of interests which are property; that the property, in a legal sense, represented by the securities, would exist if the physical evidences thereof were destroyed. But we are of opinion that these refinements are not decisive of

the congressional intent in using the term "property" in this statute. Unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense, and with the meaning commonly attributable to them. To the general understanding and with the common meaning usually attached to such descriptive terms, bonds, mortgages, and certificates of stock are regarded as property. By state and federal statutes they are often treated as property, not as mere evidences of the interest which they represent. In *Blackstone* v. *Miller*, 188 U. S. 189, 206, this court held that a deposit by a citizen of Illinois in a trust company in the City of New York was subject to the transfer tax of the State or New York and said: "There is no conflict between our views and the point decided in the case reported under the name of *State Tax on Foreign Held Bonds*, 15 Wall. 300. The taxation in that case was on the interest on bonds held out of the State. Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions. *Bacon* v. *Hooker*, 177 Massachusetts, 335, 337."

The Court of Appeals of New York, recognizing the same principle, treated such instruments as property in *People ex. rel. Jefferson* v. *Smith*, 88 N. Y. 576, 585:

"It is clear from the statutes referred to and the authorities cited and from the understanding of business men in commercial transactions, as well as of jurists and legislators, that mortgages, bonds, bills and notes have for many purposes come to be regarded as property and not as the mere evidences of debts, and that they may thus have a *situs* at the place where they are found like other visible, tangible chattels."

We have no doubt that the securities, herein involved, are property. Are they property within the United States? It is insisted that the maxim *mobilia sequuntur personam*

applies in this instance, and that the situs of the property was at the domicile of the owner in France. But this court has frequently declared that the maxim, a fiction at most, must yield to the facts and circumstances of cases which require it; and that notes, bonds and mortgages may acquire a situs at a place other than the domicile of the owner, and be there reached by the taxing authority. It is only necessary to refer to some of the decisions of this court. *New Orleans* v. *Stempel*, 175 U. S. 309; *Bristol* v. *Washington County*, 177 U. S. 133; *Blackstone* v. *Miller, supra; State Board of Assessors* v. *Comptoir National d'Escompte*, 191 U. S. 388; *Carstairs* v. *Cochran*, 193 U. S. 10; *Scottish Union & National Ins. Co.* v. *Bowland*, 196 U. S. 611; *Wheeler* v. *New York*, 233 U. S. 434, 439; *Iowa* v. *Slimmer*, 248 U. S. 115, 120. Shares of stock in national banks, this court has held, for the purpose of taxation may be separated from the domicile of the owner, and taxed at the place where held. *Tappan* v. *Merchants' National Bank*, 19 Wall. 490.

In the case under consideration the stocks and bonds were those of corporations organized under the laws of the United States, and the bonds and mortgages were secured upon property in Pennsylvania. The certificates of stock, the bonds and mortgages were in the Pennsylvania Company's offices in Philadelphia. Not only is this so, but the stocks, bonds and mortgages were held under a power of attorney which gave authority to the agent to sell, assign, or transfer any of them, and to invest and reinvest the proceeds of such sales as it might deem best in the management of the business and affairs of the principal. It is difficult to conceive how property could be more completely localized in the United States. There can be no question of the power of Congress to tax the income from such securities. Thus situated and held, and with the authority given to the local agent over them, we think the income derived is clearly from property

within the United States within the meaning of Congress as expressed in the statute under consideration. It follows that the question certified by the Circuit Court of Appeals must be answered in the affirmative.

So ordered.

MR. JUSTICE MCREYNOLDS took no part in this case.

T. H. SYMINGTON COMPANY *v.* NATIONAL MALLEABLE CASTINGS COMPANY ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

MINER *v.* T. H. SYMINGTON COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Nos. 31, 24. Argued April 19, 22, 1918.—Decided June 9, 1919.

Where certain claims of a patent called for a "pocket" or housing, without indicating whether it must be integral or might also be made in two or more parts to be assembled, *held* that the latter interpretation was the correct one, in view of another claim calling for the integral form distinctly and a provision of the specifications saying "the pocket may be cast in a single piece." P. 385.

As between two patentees, he of the prior application and patent is presumptively the prior inventor. *Id.*

Oral testimony tending to show prior invention as against an existing patent is, in the absence of models, drawings, or kindred evidence, open to grave suspicion, particularly if taken long after the time of alleged invention. P. 386.

A mental conception in process of development, occasionally outlined

on scraps of paper, subsequently discarded, and roughly worked into a small wooden model with a pen-knife, *held* not to amount to invention. P. 386.

230 Fed. Rep. 821; 234 *id.* 343, affirmed.

229 Fed. Rep. 730, reversed.

THE cases are stated in the opinion.

Mr. George I. Haight for petitioner in No. 24.

Mr. Melville Church and *Mr. Gilbert P. Ritter*, with whom *Mr. W. S. Symington, Jr.*, and *Mr. Ernest F. Mechlin* were on the briefs, for petitioner in No. 31 and respondent in No. 24.

Mr. Charles Neave, with whom *Mr. Clarence D. Kerr* was on the brief, for respondents in No. 31.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

These cases are so related that they may be disposed of together. Each is a suit to enjoin the infringement of a patent. One was begun in the District of Maine and is based on letters patent granted May 7, 1901, to Jacob J. Byers on an application filed April, 21 1900. The other was begun in the Northern District of Illinois and is based on letters patent granted February 18, 1902, to William H. Emerick on an application filed May 24, 1901. Both patents cover an improvement in draft rigging for railroad cars. In each suit it became necessary to compare the patents, determine whether the invention of one was anticipated by the other, and ascertain which of the patentees was the original and first inventor. Ultimately the suits reached the Circuit Courts of Appeals for the circuits in which they were brought. In the Maine suit the court held that Byers was the prior inventor and that

claims three, five and six of the patent to him were valid and infringed. 230 Fed. Rep. 821; 234 Fed. Rep. 343. In the Illinois suit the court held that Emerick was the prior inventor and that claims one, two, three and four of the patent to him were valid and infringed. 229 Fed. Rep. 730. These conflicting decisions led to the allowance of the present writs of certiorari.

While the discussion at the bar and in the briefs has taken a wide range, only two points need be considered.

One of the elements called for by the claims in the Byers patent which were sustained is a "pocket" or housing, which is to hold other parts in place. The corresponding element of the Emerick patent is described as "counterpart castings" and is in two parts. Whether the Byers pocket was to be integral or might be in two or more parts is a matter about which the two courts differed. In the Maine suit it was held that the claims were not limited to an integral pocket, but in the Illinois suit the ruling was the other way. The former view, as it seems to us, is the right one. There is nothing in Byers' claims which were sustained indicating that the pocket is to be integral, while there is a distinct call for such a pocket in claim nine. The difference in terms points persuasively to a difference in purpose, and the specification does even more, for it says "the pocket may be cast in a single piece." This is the common form of designating an admissible alternative in such instruments. Of course, the other alternative is casting it in a plurality of pieces. When this is done and the pieces are assembled they form a pocket and serve in the same way as if there were but one.

The courts differed also as to who was the prior inventor. Presumptively it was Byers, for his application and patent were both prior to Emerick's application. Recognizing this, the parties claiming under Emerick sought by proof to carry his invention back to an earlier date, and to that end produced the testimony of three

witnesses, Emerick being one. All three testified in both suits, their testimony being substantially the same in both. In the Maine suit the court pronounced this testimony too equivocal and uncertain to establish priority as against Byers' application and patent, but in the Illinois suit the court, although regarding the testimony as hardly satisfactory, gave effect to it. On reading it we are persuaded that it was clearly insufficient.

This court has pointed out that oral testimony tending to show prior invention as against existing letters patent is, in the absence of models, drawings or kindred evidence, open to grave suspicion; particularly if the testimony be taken after the lapse of years from the time of the alleged invention. *Deering* v. *Winona Harvester Works*, 155 U. S. 286, 300. And it has said: "A conception of the mind is not an invention until represented in some physical form, and unsuccessful experiments or projects, abandoned by the inventor, are equally destitute of that character." *Clark Thread Co.* v. *Willimantic Linen Co.*, 140 U. S. 481, 489.

Here the evidence was oral. No model, drawing or kindred exhibit was produced. Fifteen years had elapsed since the date as of which invention was being claimed. The testimony was not direct and strong, but weak and uncertain and in some respects contradictory. At most it only disclosed a mental conception in process of development which occasionally was outlined on scraps of paper and then committed to the waste basket and was roughly worked into a wooden model four or five inches long with a pen knife. The first real model or drawing was made about the time of the actual application for a patent and there was no attempt at reduction to practice until after the patent was issued. Such proof under the rule just stated does not suffice.

Decree in No. 31 affirmed.
Decree in No. 24 reversed.

Syllabus.

NORTHERN PACIFIC RAILWAY COMPANY ET AL. *v.* McCOMAS.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 172. Argued January 22, 1919.—Decided June 9, 1919.

Lands constituting parts of odd-numbered sections within the primary limits of the land grant made to the Northern Pacific Railroad Company by the Act of July 2, 1864, c. 217, 13 Stat. 365, but which, at the date when that company's line opposite them was definitely located, were claimed by the State of Oregon under the Swamp Land Acts, as evidenced by its selection list on file in the Land Department, were excepted by the Act of 1864 from the grant of place lands, whether the claim of the State was valid or not. Pp. 389, 391.

Patents erroneously issued for such lands, as place lands, gave to the railroad only the legal title, leaving the equitable title in the United States. *Id.*

Undisputed possession, cultivation and improvement of public lands, under a conveyance from a State based on an unapproved selection of the lands as swamp lands, can convey no title. P. 391.

Where public lands are claimed by an individual under the Swamp Land Act, and by a railroad under lieu selections, the courts cannot anticipate adjudication by the Land Department, beyond protecting or restoring a possession lawfully acquired. P. 392.

Whether public lands are such as to come within the Swamp Land Act and whether they have been so occupied and appropriated as not to be subject to lieu selection by a railroad, are questions for the decision of the Land Department. *Id.*

Approval of a lieu land selection is not a mere formal act, but involves an exercise of sound discretion by the Secretary of the Interior. P. 393.

The Secretary may reject such a selection and hold the title in the United States for the protection of a *bona fide* occupant, who under a misunderstanding of his rights has reclaimed and improved the land at large cost. *Id. Williams* v. *United States*, 138 U. S. 514, 524.

Where land, occupied and claimed by an individual under the swamp land law, was patented pending the suit to a railroad under a lieu

selection, *held* that the occupant could not avail of the statute of limitations or attack the patent collaterally. P. 393.

Where a railroad reconveys lands erroneously patented as place lands, and selects them as lieu lands, the fact that the land officers entertain the selections and pass one of them to patent establishes that the reconveyance was accepted by the United States. *Id.*

82 Oregon, 639, reversed.

THE case is stated in the opinion.

Mr. Charles Donnelly, with whom *Mr. Charles W. Bunn* was on the brief, for petitioners.

Mr. Harvey M. Friend for respondent.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a suit to quiet title in the plaintiff to five small tracts of land in Umatilla County, Oregon, the right to such relief being predicated solely on adverse possession under color of title for ten years, the period prescribed in a local statute. The plaintiff obtained a judgment, which at first was affirmed by the Supreme Court of the State and then on a petition for rehearing was modified as to two of the tracts. 82 Oregon, 639. The case is here on writ of certiorari.

There was substantial testimony tending to show that McComas, the plaintiff, and his predecessors had been in undisputed possession of the lands for ten years when the suit was brought and that during that period they had been cultivating the lands and claiming the same under the deeds from the State hereinafter mentioned and had put improvements thereon costing more than ten thousand dollars. The other facts are set forth in a stipulation found in the record.

The lands are all parts of odd-numbered sections within

the primary or place limits of the land grant made to the Northern Pacific Railroad Company by the Act of July 2, 1864, c. 217, 13 Stat. 365. At the date of that act they were public lands of the United States and they continued to be such at the time the line of road opposite which they lie was definitely located, save as their status was affected by a pending claim of the State under the swamp-land grant made by the Acts of September 28, 1850, c. 84, 9 Stat. 519, and March 12, 1860, c. 5, 12 Stat. 3. This claim was shown by a swamp-land selection list filed in the Land Department November 23, 1872, and was still pending in that department in 1892 and 1895. In those years the State, without waiting for a determination of its claim by the department, executed deeds for the lands to persons who in turn executed deeds therefor to the plaintiff. As to three of the tracts the swamp-land claim was examined and rejected by the department some time before this suit was begun, and as to the other two it was still pending at that time.

The definite location of the line of road opposite which the lands lie was effected by a map filed in the Land Department and approved June 29, 1883. The grant to the railroad company was of all the odd-numbered sections of public land within designated limits on either side of the line of road as so located, with an express exception of such lands as at the time of definite location were reserved, sold, etc., or were not "free from preëmption, or other claims or rights." There was also an express exclusion of all mineral lands and a provision that "in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road may be selected" under the direction of the Secretary of the Interior. By reason of the pendency of the swamp-land claim at the time of the definite location all the tracts in question were excepted from the grant of lands in place, and this whether

the claim was well grounded or otherwise; that is to say, the fact that the claim was pending and undetermined prevented the lands from passing under the grant as place lands. *Whitney* v. *Taylor*, 158 U. S. 85, 92–94; *Northern Pacific R. R. Co.* v. *Sanders*, 166 U. S. 620, 630; *Northern Pacific R. R. Co.* v. *Musser-Sauntry Co.*, 168 U. S. 604, 609. But through some mistake in the Land Department three of the tracts were erroneously patented to the railroad company as place lands between 1906 and 1909. Without doubt the patents passed the legal title, but the United States was entitled to a reconveyance from the railroad company and in equity remained the true owner. *Germania Iron Co.* v. *United States*, 165 U. S. 379. The two tracts not patented as place lands were selected by the railroad company in 1908 and a succeeding year in lieu of other lands in place excluded from the grant by reason of being mineral. These selections were received by the local land office and were awaiting action by the Secretary of the Interior at the time of the trial.

This suit was brought September 25, 1912. Shortly thereafter the railroad company, recognizing that the patents theretofore issued to it for three of the tracts had been erroneously issued, reconveyed the title to the United States and subsequently selected those tracts in lieu of other tracts in place excluded from the grant by reason of being mineral. These selections were received by the local land office; one was approved by the Secretary of the Interior and passed to patent, and the other two were at the time of the trial pending before that officer.

The plaintiff made no effort by pleading or evidence to show that the swamp-land claim was well grounded or that he, his predecessors or the State, had in any way become entitled to receive the title from the United States.

With some hesitation the trial court concluded that the lands were not excepted from the grant of lands in

place by reason of the existence of the swamp-land claim at the date of the definite location, and therefore that on the definite location, by which the place limits were identified, the title passed to the railroad company, the grant being one *in præsenti* as respects place lands falling within its terms and not within its excepting or excluding clauses, and the provision for patents being intended only to give further assurance. *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241; *Toltec Ranch Co.* v. *Cook*, 191 U. S. 532. On that theory a decree was entered quieting the title in the plaintiff as to all the tracts.

But the court should have held that the swamp-land claim pending, as it was, at the date of the definite location prevented these lands from passing under the grant of lands in place. The decisions of this court before cited leave no room for doubt on this point. The cases of *Iowa Railroad Land Co.* v. *Blumer*, 206 U. S. 482, and *Missouri Valley Land Co.* v. *Wiese*, 208 U. S. 234, relied on by the plaintiff, are not apposite. The lands there in question were within the place limits and at the time of definite location were free from other claims; so they were not excepted from the grant, as here, but passed from the Government on the definite location. It follows that as to the three tracts erroneously patented as before shown the railroad company had no title, legal or equitable, prior to the issue of the patents. Up to that time the title was in the United States, and of course no prescriptive right was acquired against it under the local statute. Besides, the title received through those patents was turned back to the United States before the trial and this operated to restore the three tracts to their prior status as public lands. The title under those patents—and it was merely the naked legal title—did not remain in the railroad company for anything like the period named in the local statute, if that be material. As to the other two tracts the railroad company up to the time the suit was brought had nothing

more than pending lieu land selections which required the approval of the Secretary of the Interior to make them effective, *Wisconsin Central R. R. Co.* v. *Price County*, 133 U. S. 496, 512, but as yet they had not received his approval.

The situation then at the time the case was heard in the trial court was this: The railroad company had neither the legal nor the equitable title to four of the tracts. Instead, the full title was in the United States and all existing claims to them arising under the land grants and other public land laws were pending in the Land Department, whose officers were specially charged by law with their examination and determination and with the disposal of the title accordingly. It is settled that in such a situation the courts may not take up the adjudication of the pending claims, but must await the decision of the land officers and the issue of patents in regular course. *Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 589, 592–594; *Brown* v. *Hitchcock*, 173 U. S. 473; *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.*, 190 U. S. 301, 315; *Humbird* v. *Avery*, 195 U. S. 480, 502. There is, however, a related jurisdiction which the courts may exercise pending the final action of those officers; they may protect a possession lawfully acquired or restore one wrongfully interrupted, for that is a matter which is not confided to the Land Department and may be dealt with by the courts in the exercise of their general powers. *Gauthier* v. *Morrison*, 232 U. S. 452, 461.

Whether the tracts as to which the swamp-land claim is still pending were such as came within the terms of the swamp-land grant is a question of fact the decision of which is expressly committed to the Land Department; and this also is true of the question whether the tracts covered by the railroad company's lieu land selections were when the selections were tendered so occupied and appropriated as not properly to be subject to acquisition

in that way. The approval or disapproval by the Secretary of the Interior of such lieu selections is not merely a formal act. It involves an exercise of sound, but not arbitrary, discretion and makes it admissible for him, where a selection is proffered for land which a bona fide occupant, misinformed and misunderstanding his rights, has reclaimed and improved at large cost, to reject the selection and hold the title in the United States until, as this court has said, "within the limits of existing law or by special act of Congress," the occupant may be enabled to obtain title from the United States, *Williams* v. *United States*, 138 U. S. 514, 524.

As to the fifth tract the railroad company at the time of the trial held a patent issued pending the suit on a lieu land selection but recently initiated; so the prescriptive right asserted by the plaintiff could not possibly include that tract. If, as he asserts, the tract was so occupied or appropriated that it properly could not be selected and patented in lieu of land in place found to be mineral, that may afford an adequate basis for a suit by the United States to cancel the patent, *Diamond Coal & Coke Co.* v. *United States*, 233 U. S. 236, or afford a basis for holding the railroad company as a trustee of the title for him if, notwithstanding the silence of the present record on the subject, he was entitled to a patent for the tract, *Svor* v. *Morris*, 227 U. S. 524, 529–530; but it does not enable him to complain on behalf of the United States or to assail the patent collaterally. *Hoofnagle* v. *Anderson*, 7 Wheat. 212, 214–215; *Smelting Co.* v. *Kemp*, 104 U. S. 636, 647; *Bohall* v. *Dilla*, 114 U. S. 47, 51; *Sparks* v. *Pierce*, 115 U. S. 408, 412; *Fisher* v. *Rule*, 248 U. S. 314, 318.

The Supreme Court of the State in its final opinion came nearer the views here expressed than did the trial court, but it assumed that the reconveyance by the railroad company to the United States was not accepted by the latter and so was of no effect. In this the court was mis-

taken, for it affirmatively appears not only that the land officers after the reconveyance entertained the lieu selections of the same tracts, but also that they approved one of those selections and passed it to patent. Besides, the ultimate judgment entered by the court departs somewhat—possibly through a clerical inadvertence—from its final opinion.

The judgment must be reversed and the cause remanded for further proceedings not inconsistent with the views here expressed.

Judgment reversed.

CITY OF PAWHUSKA *v.* PAWHUSKA OIL & GAS COMPANY ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 281. Argued March 25, 1919.—Decided June 9, 1919.

As respects grants to municipalities of governmental authority—and such is the authority to regulate the rates charged to a city and its inhabitants by a gas company—the power of the States is not restrained by the contract clause of the Constitution. P. 397.

A city contended that, at the time when it granted a franchise to a gas company to use the streets and supply gas to the city and its inhabitants, the city alone had authority to regulate the charges and service thereunder within its municipal limits; that the legislature could not transfer that authority to a state commission consistently with the state constitution; and that in consequence a later act of the legislature, and an order of the commission thereunder changing the service and increasing the rates, impaired the obligation of the franchise contract between the city and the company. *Held*, that no question was presented under the contract clause affording this court jurisdiction to review a judgment against the city by the state Supreme Court. P. 396.

Writ of error to review 166 Pac. Rep. 1058, dismissed.

THE case is stated in the opinion.

Mr. Preston A. Shinn for plaintiff in error.

Mr. T. J. Leahy, with whom *Mr. C. S. Macdonald* and *Mr. Burdette Blue* were on the brief, for defendants in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

A city in Oklahoma is complaining here of an order of the corporation commission of the State, made in 1917, regulating the rates and service of a gas company engaged in supplying natural gas to the city and its inhabitants. The company has a franchise, granted by the city in 1909, which entitles it to have its pipe lines in the streets and alleys of the city and provides that the gas shall be supplied at flat or meter rates, at the option of the consumer, and that the rates shall not be in excess of fixed standards.

When the franchise was granted there was a provision in the state constitution, Art. XVIII, § 7, reading: "No grant, extension, or renewal of any franchise or other use of the streets, alleys, or other public grounds or ways of any municipality, shall divest the State, or any of its subordinate subdivisions, of their control and regulation of such use and enjoyment. Nor shall the power to regulate the charges for public services be surrendered; and no exclusive franchise shall ever be granted"; and there also was a statutory provision, Rev. Stats. 1903, § 398; Rev. Laws, 1910, § 593, declaring: "All such grants shall be subject at all times to reasonable regulations by ordinance as to the use of streets and prices to be paid for gas or light."

In 1913 the state legislature adopted an act providing that the corporation commission "shall have general super-

vision over all public utilities, with power to fix and establish rates and to prescribe rules, requirements and regulations, affecting their services." Laws 1913, c. 93, § 2. It was under this act, and after a full hearing on a petition presented by the gas company, that the order in question was made. The order abrogates all flat rates, increases the meter rates, requires that the gas be sold through meters to be supplied and installed at the company's expense, and recites that the evidence produced at the hearing disclosed that the franchise rates had become inadequate and unremunerative and that supplying gas at flat rates was productive of wasteful use. On an appeal by the city the Supreme Court of the State affirmed the order. 166 Pac. Rep. 1058.

The city contended in that court—and it so contends here—that at the time the franchise was granted it alone was authorized to regulate such charges and service within its municipal limits, that the legislature could not transfer that authority to the corporation commission consistently with the constitution of the State, and that in consequence the act under which the commission proceeded and the order made by it effected an impairment of the franchise contract between the city and the gas company in violation of the contract clause of the Constitution of the United States. Or, stating it in another way, the contention of the city was and is that the authority to regulate the rates and service, which concededly was reserved at the time the franchise was granted, was irrevocably delegated to the city by the constitution and laws of the State and therefore that the exertion of that authority by any other state agency, even though in conformity with a later enactment of the legislature, operated as an impairment of the franchise contract.

Dealing with this contention the state court, while fully conceding that the earlier statute delegated to the city the authority claimed by it, held that this delegation was

to endure only "until such time as the State saw fit to exercise its paramount authority," that under the state constitution the legislature could withdraw that authority from the city whenever in its judgment the public interest would be subserved thereby, and that it was effectively withdrawn from the city and confided to the corporation commission by the Act of 1913. The claim that this impaired the franchise contract was overruled.

It is not contended—nor could it well be—that any private right of the city was infringed, but only that a power to regulate in the public interest theretofore confided to it was taken away and lodged in another agency of the State—one created by the state constitution. Thus the whole controversy is as to which of two existing agencies or arms of the state government is authorized for the time being to exercise in the public interest a particular power, obviously governmental, subject to which the franchise confessedly was granted. In this no question under the contract clause of the Constitution of the United States is involved, but only a question of local law, the decision of which by the Supreme Court of the State is final.

"Muncipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with

the State within the meaning of the Federal Constitution." *Hunter* v. *Pittsburgh*, 207 U. S. 161, 178.

In *Dartmouth College* v. *Woodward*, 4 Wheat. 518, it was distinctly recognized that as respects grants of political or governmental authority to cities, towns, counties and the like the legislative power of the States is not restrained by the contract clause of the Constitution, pp. 629–630, 659–664, 668, 694; and in *East Hartford* v. *Hartford Bridge Co.*, 10 How. 511, where was involved the validity of a state statute recalling a grant to a city, theretofore made and long in use, of power to operate and maintain a ferry over a river, it was said, p. 533, that the parties to the grant did not stand "in the attitude towards each other of making a contract by it, such as is contemplated in the Constitution, and as could not be modified by subsequent legislation. The legislature was acting here on the one part, and public municipal and political corporations on the other. They were acting, too, in relation to a public object, being virtually a highway across the river, over another highway up and down the river. From this standing and relation of these parties, and from the subject-matter of their action, we think that the doings of the legislature as to this ferry must be considered rather as public laws than as contracts. They related to public interest. They changed as those interests demanded. The grantees, likewise, the towns being mere organizations for public purposes, were liable to have their public powers, rights, and duties modified or abolished at any moment by the legislature. . . . Hence, generally, the doings between them and the legislature are in the nature of legislation rather than compact, and subject to all the legislative conditions just named, and therefore to be considered as not violated by subsequent legislative changes." In *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79, where a city, relying on the contract clause, sought a review by this court of a

judgment of a state court sustaining a statute so modifying the franchise of a water works company as to require the city to pay for water used for municipal purposes, to which it theretofore was entitled without charge, the writ of error was dismissed on the ground that no question of impairment within the meaning of the contract clause was involved. Some of the earlier cases were reviewed and it was said, p. 91, "But further citations of authorities upon this point are unnecessary; they are full and conclusive to the point that the municipality, being a mere agent of the State, stands in its governmental or public character in no contract relation with its sovereign, at whose pleasure its charter may be amended, changed or revoked, without the impairment of any constitutional obligation, while with respect to its private or proprietary rights and interests it may be entitled to the constitutional protection. In this case the city has no more right to claim an immunity for its contract with the Water Works Company, than it would have had if such contract had been made directly with the State. The State, having authorized such contract, might revoke or modify it at its pleasure."

The principles announced and applied in these cases have been reiterated and enforced so often that the matter is no longer debatable. *Covington* v. *Kentucky*, 173 U. S. 231, 241; *Worcester* v. *Worcester Street Ry. Co.*, 196 U. S. 539, 548; *Braxton County Court* v. *West Virginia*, 208 U. S. 192; *Englewood* v. *Denver & South Platte Ry. Co.*, 248 U. S. 294, 296.

Writ of error dismissed.

ARIZONA EMPLOYERS' LIABILITY CASES.[1]

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA AND TO THE SUPREME COURT OF THE STATE OF ARIZONA.

Nos. 20, 21, 232, 332, 334.—Argued January 25, 28, 1918; April 24, 25, 1919.—Decided June 9, 1919.

The Arizona Employers' Liability Law (Rev. Stats., 1913, pars. 3154, 3156, 3158, 3160,) in respect of certain specified employments reasonably designated as inherently hazardous and dangerous to workmen, imposes upon the employer, without regard to his fault or that of any person for whose conduct he is responsible, liability in compensatory (not speculative or punitive) damages for the accidental personal injury or death of any employee arising out of and in the course of the employment and due to a condition or conditions of the occupation, but not caused by the employee's own negligence. *Held*, that it does not infringe the rights of employers under the Fourteenth Amendment. Pp. 419, *et seq.* *New York Central R. R. Co.* v. *White*, 243 U. S. 188.

The States are left a wide field of discretion to change their laws, and their legislation is not subject to constitutional objection upon the ground that it is novel and unwise. Pp. 419–421.

The court has repeatedly adjudged that the rules governing the liability of employers for death or injury of employees in the course of the employment are subject, as rules of future conduct, to alteration by the States and that, excluding unreasonable or arbitrary changes, the employer may be made liable without fault and the common-law defenses be abolished. P. 419.

In this instance, the effect of the statute is to require the employer instead of the employee to assume a pecuniary risk inherent in the

[1] The docket titles of these cases are: *Arizona Copper Company, Limited*, v. *Hammer*, No. 20, *Arizona Copper Company, Limited*, v. *Bray*, No. 21, *Ray Consolidated Copper Company* v. *Veazey*, No. 232, in error to the District Court of the United States for the District of Arizona; *Inspiration Consolidated Copper Company* v. *Mendez*, No. 332, *Superior & Pittsburg Copper Company* v. *Tomich, sometimes known as Thomas*, No. 334, in error to the Supreme Court of the State of Arizona.

employment, and due to its conditions and not to the negligence of the employee killed or injured, leaving the employer, as the common law in theory left the employee, to take such risk into consideration in fixing wages, with the opportunity, besides, to charge the loss as a part of the cost of the product of the industry. P. 420.

The statute limits recovery strictly to compensatory damages—excluding punitive damages, which it may be conceded would be contrary to natural justice—and makes only such discrimination between employer and employee as necessarily arises from their different relations to the common undertaking. There is no denial of the equal protection of the laws. P. 422.

The statute adds no new burden to the cost of industry, but merely recognizes and in part transfers to the employer an existing and inevitable burden due to the hazardous nature of the industry. P. 424.

The statute may be regarded as a police regulation, designed to prevent the injured employees and their dependents from becoming a burden upon the public; and, so regarded, it can not be said to be so clearly unreasonable and arbitrary that this court should declare it violative of the Fourteenth Amendment. *Id.*

It amounts to a contradiction of terms to say that, in leaving the issues of fact and the compensatory damages to be determined by juries according to the established procedure of the courts, the statute violates due process of law. P. 426.

If a State establishes a right of action for compensation to injured workmen upon grounds not arbitrary or fundamentally unjust, the question whether the award shall be measured as compensatory damages are measured at common law, or according to some prescribed scale reasonably adapted to produce a fair result, is for the State to determine. P. 428.

Whether such compensation should be paid in a single sum or distributed during the period of disability or need, is likewise for the State to determine. P. 429.

The objection that the Arizona act may be extended by construction to non-hazardous industries can not be raised by parties whose industries were indisputably hazardous. *Id.*

The objection that the benefits of the act may be extended, in the case of a death claim, to those not nearly related to or dependent upon the workman, or may even go by escheat to the State, *held*, not presented, the Arizona court having construed the act as confining recovery to compensatory damages. P. 430.

The Arizona system allows the injured employee an election of remedies, permitting restricted recovery under a "compensation law" although he has been guilty of contributory negligence, and full compensatory damages under the Employers' Liability Act if he has not. *Held*, not inconsistent with the due process or equal protection clauses, as respects employers. P. 430.

CONCURRING OPINION OF HOLMES, J.:—

That certain voluntary conduct may constitutionally be put at the peril of those pursuing it finds illustrations in the criminal law and in the extent to which a master may be held for acts of a servant. P. 432.

The criterion of fault itself involves applying the external standard of prudence, and the decision of a jury. *Id.*

Holding the employer liable for accidents tends directly to secure attention to the safety of the men,—an unquestionably constitutional object of legislation. *Id.*

In allowing damages for pain and mutilation, the Arizona law constitutionally may have been based on the view that, if a business is unsuccessful it means that the public does not care enough for it to make it pay, and, if it is successful, the public pays the expenses, and something more, and should pay, as part of the cost of producing what it wants, the cost of pain and mutilation incident to the production; and that, by throwing that loss upon the employer in the first instance, it is thrown in the long run, justly, upon the public. P. 433.

The liability under this law is limited to a conscientious valuation of the loss, and it is to be presumed that juries and courts will confine it accordingly. *Id.*

It is not urged, in this case, that the provision for 12 per cent. interest from the date of suit, in case of an unsuccessful appeal, is void. P. 434.

19 Arizona, 151; *id.* 182, affirmed.

THE cases are stated in the opinion.

Mr. Ernest W. Lewis and *Mr. John A. Garver*, with whom *Mr. W. C. McFarland* was on the briefs, for plaintiff in error in Nos. 20, 21:

In reaching the conclusion that the workmen's com-

pensation acts of New York, Iowa and Washington were a valid exercise of legislative power, this court was influenced by two considerations: one, involving a legal principle, that in taking away the common-law defenses, or some of them, from the employer, the legislature had substituted a substantial equivalent, in limiting the liability of the employer according to a prescribed and reasonable schedule, which would probably not be any more onerous upon him than his common-law liability; and the other, involving social and economic considerations, that the legislation was a valid exercise of the police power, in promoting the general welfare. *New York Central R. R. Co.* v. *White*, 243 U. S. 188, 203; *Hawkins* v. *Bleakly*, 243 U. S. 210; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 234.

The justification for legislation of this kind is that, in the interest of society, hazardous occupations should themselves be charged with the reasonable burden of sustaining the inevitable loss resulting from the inherent risks of the business, which no ordinary care or foresight can guard against, and that a liability or insurance fund should be created by a tax upon the business, which, on the one hand, will afford substantial and speedy compensation to the injured employee, and prevent his becoming an object of charity, and, on the other hand, will protect the employer from uncertain and possibly ruinous verdicts that might bankrupt the business, to the injury, not only of the particular employer and of all other workmen employed by him, but of society generally. The fund is in the nature of an insurance against the joint risk in which the parties embark. The liability of the employer is defined and regulated according to the injuries sustained, and the right of the employee to receive, without delay, the entire compensation thus fixed, is established. Both employer and workman are directly benefited, and the State is relieved from caring for many

unfortunates who might otherwise become dependent upon it.

But legislation of this kind, as this court pointed out, must be reasonable to the employer as well as to the employed. It promotes the general welfare only in so far as it relieves society from the ills of the existing system. One of the greatest of those ills was the heavy burden of litigation which the old system fostered, with long deferred and scant, if any, benefits to the person sustaining the injuries, with great expense both to the State and to the employer, and with an uncertain liability thrown upon the employer, against which he could protect himself only by insurance in companies whose principal business consisted in combating all claims for injuries.

The Arizona legislature completely failed to apply either of the principles referred to by this court. The employer is deprived of his common-law defenses and is given nothing in return, because the workman is left free to reject the compensation provided by the Workmen's Compensation Law. The statute will cause direct injury to society at large; for unlimited liability without fault will necessarily act as an effectual deterrent to the investment of capital in industries declared to be hazardous. Men of small means might be ruined by a single verdict; and large corporations would be in constant danger from excessive verdicts, as is obvious from the verdicts in these cases.

The Liability Law leaves a workman, whose injury is due solely to his own negligence, the right to demand compensation under the Workmen's Compensation Law. Thus, in the only instance in which an employer could interpose a complete defense under the Liability Law, he is obliged to make compensation under the Compensation Law.

A further peculiar consequence of this Liability Law is that, if the employer pleads that the negligence of the

workman contributed to the injury, he is thereby prevented from claiming that he himself was not guilty of negligence, *Superior & Pittsburg Copper Co.* v. *Tomich*, 19 Arizona, 182; and if the employer is actually guilty of some negligence, he gets off more lightly than if he is entirely free from fault, because, in the former case, the liability will be apportioned between the employer and employee in proportion to their negligence. See dissenting opinion of Ross, J., in *Superior & Pittsburg Copper Co.* v. *Tomich, supra.*

A further peculiar feature of this Liability Law is that there may be a recovery in the case of death, even where there is no one in existence who was in any way dependent upon the decedent, and even though his next of kin may be enemies of the State and Nation, or even though he may have no ascertainable next of kin. Workmen's compensation laws should limit the benefits to the injured person or those actually dependent upon him; and this principle has been universally recognized in this and other countries.

No other State, so far as we have been able to ascertain, has ever gone to the extreme extent shown in this Arizona legislation, of subjecting employers to unlimited liability without any fault on their part, or without any compensating obligation on the part of the workmen. The Arizona Workmen's Compensation Law is a mere farce, so far as any protection to the employer is concerned; and it is resorted to by the workman only when his own conduct has effectually barred his recovery in an action at law.

There are certain cases in which the courts have recognized that there may be liability without fault; but they are exceptions to the general rule of liability under our law and depend on conditions which are in no way applicable to this situation. Some of them are based on the ancient insurer's liability of innkeepers and carriers, while others relate to the strict liability which has been

imposed on railroads in relation to damages caused by fire or by injuries to cattle. The latter are really not cases of liability without fault, as the liability is usually imposed only where there has been a failure to comply with some reasonable requirement, such as fencing the railroad's right of way. This is simply an instance of the power of the legislature to create a new obligation, failure to observe which is a sufficient wrong to be the basis of liability.

Mr. Frank E. Curley and *Mr. L. Kearney*, with whom *Mr. Frank H. Hereford* was on the briefs, for defendants in error in Nos. 20, 21.

Mr. William H. King, with whom *Mr. Alexander Britton*, *Mr. Evans Browne* and *Mr. F. W. Clements* were on the brief, for plaintiff in error in No. 232:

In *New York Central R. R. Co.* v. *White*, 243 U. S. 188, 201, this court considered the New York Workmen's Compensation Act, and specifically held that it was a substituted system, devised to compensate employees or their dependents for injuries received in certain hazardous occupations, the measure of damages being based upon the loss of earning power, having regard to the previous wage and the character and duration of disability, and in case of death, benefits according to the dependency of the surviving wife, husband, etc.

The Employers' Liability Law of Arizona does not relieve "the employer from responsibility for damages, measured by common-law standards." It does not "require him to contribute a reasonable amount, according to a reasonable and definite scale, by way of compensation for loss of earning power." It is not a substituted system, assuring the employee "a definite and easily ascertained compensation," and the employee is not required to assume "any loss beyond the prescribed scale."

400. Argument for Plaintiff in Error No. 332.

It abuses the recognized power of "the State to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee . . . in lieu of the common-law liability confined to cases of negligence," by permitting a recovery of an unlimited amount, not for disability alone, as in the *White Case*, but for physical suffering also. It is not a composition of losses sustained in a mutual joint adventure (as Justice Pitney reasons), in which accidental injury is inevitable and is expected, but it places all of the loss, without limitation, upon one of the "co-adventurers," to-wit, the employer.

It not only practically deprives the employer of all of the defenses known to the common law, but takes from him the right to defend by showing that he was guilty of no fault. In other words, the legislation is all in favor of the employee, and the employer is given no chance to escape the unlimited liability imposed. When action is commenced under this act, the employer has no alternative. He cannot relegate the employee to any other act or mode of procedure, except the one which the employee himself has selected. And when damages have been imposed in pursuance of the provisions of this law, under the conditions before stated the employer is deprived of his property without due process of law, and denied the equal protection of the law.

No counsel appeared for defendant in error in No. 232.

Mr. Edward W. Rice, by leave of court, filed a brief as *amicus curiæ* in No. 232.

Mr. Edward W. Rice, with whom *Mr. Harvey M. Friend* was on the brief, for plaintiff in error in No. 332:

This law is in no sense a regulation of dangerous employments. No new duty is imposed upon the employer

and he is subjected to no liability for failure to discharge his duties, new or old. The law merely imposes a new pecuniary liability for injuries that cannot be foreseen or prevented by any degree of care. This cannot increase the care of the employer or protect the employee from injury. It merely seeks to impose a new liability on employers. It is devoid of all of the features that characterize measures which seek to attain social justice by regulating in the interest of the public the private relation of master and servant out of which losses from industrial accidents are bound to arise. Our conclusion is that this is merely a labor law confined to the rights and liabilities of the employee and employer and not a police measure in which the public has an interest. Consequently the question of its validity should be determined by the principles which govern laws affecting private rights as distinguished from those by which police measures enacted primarily to safeguard the public are to be tested. This court, throughout its career, has recognized how firmly the fabric of free government rests upon the inviolability of private right. The preservation of individual liberty and the protection of private property and of the right of private contract are essential to all free government. *Fletcher* v. *Peck*, 6 Cranch, 87, 135; *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago*, 166 U. S. 226, 237; *Citizens' Savings & Loan Association* v. *Topeka*, 20 Wall. 663, 665; *Holden* v. *Hardy*, 169 U. S. 366, 389; *New York Central R. R. Co.* v. *White*, 243 U. S. 188, 202.

From the fact that private right must be subordinated to the public welfare, it does not follow that in those cases where the public welfare does not require the surrender of private right the legislature, merely as between individuals, may make arbitrary distribution of private losses. *Lochner* v. *New York*, 198 U. S. 45, 56. In the case of a mere labor law the slightest exaction would be beyond the legislative power. *Mountain Timber Co.* v. *Wash-*

ington, 243 U. S. 219, 240. The law of negligence is founded upon reason. It is reasonable that an individual should refrain from causing injury to another by his negligence, and that he should make recompense for injury so caused, but it is self-evident that the establishment of a rule of unlimited liability without fault as the governing rule of individual responsibility would merely substitute for the old natural law of non-liability a new tyranny of irresponsible and arbitrary power. This is precisely what the Arizona law attempts to do.

The obligation of the individual to respond in damages for negligence and his right to immunity from liability when not at fault are thus among those obligations and rights that inhere in free government. It is because of their fundamental character that they have persisted throughout our legal history. Changes have been made from time to time in the administration of the law of negligence, as in the defenses available to relieve one charged with negligence, and in the extent of the duties assumed or imposed, the breach of which shall constitute negligence, and in the rules of evidence in such cases, but the individualistic basis of liability for personal injury, and its converse of immunity from responsibility in the absence of negligence, as rules of individual liability, have remained unchanged in their broad outlines. Nothing inherent in free government or natural justice requires that one charged with negligence should be allowed to urge the defenses of assumption of risk, contributory negligence or fellow-servant, or that the conception of duties, the breach of which constitute negligence, should not develop with the unfolding industrial life of the people. Therefore, as this court has repeatedly declared, these defenses may be modified or entirely abrogated and new duties may be created.

The distinction is both clear and fundamental between the proposition that, regardless of these defenses, an

employer shall be liable in damages for his negligence, either personal or properly imputed to him, and the further proposition that he shall be liable as for negligence when he is in no sense at fault. Under the first proposition the question of negligence still remains, and on this fundamental question the defendant has the right to defend. Under the second proposition, liability is practically prejudged. If the right to defend cannot thus be taken away indirectly by a conclusive presumption of negligence, *Mobile, Jackson &c. R. R. Co.* v. *Turnipseed*, 219 U. S. 35, 43, it cannot be taken away directly by a departure from the principle of negligence as the basis of individual liability for injury. *Middleton* v. *Texas Power & Light Co.*, 108 Texas, 96, 107. There are certain instances of liability which are sometimes cited as examples of liability without fault. *Chicago, Rock Island & Pacific Ry. Co.* v. *Zernecke*, 183 U. S. 582, 586; *New York Central R. R. Co.* v. *White*, 243 U. S. 188, 204. But when analyzed they will be found to furnish no substantial basis in reason or in law for the support of legislation such as that presented in this case. By the ancient law of deodands, the property of a man wholly innocent of wrong was confiscated by the Crown under the false cloak of religion. In admiralty, the ship itself is treated as a wrongdoer, but is only answerable for the wrong of those in charge of her. The maxim of agency "*qui facit per alium facit per se*," which is the real foundation of the husband's liability as well as that of the master, involves imputed fault in cases where the relation of the parties furnishes some foundation in justice for the imposition of liability. The fault is there, but it may not be the personal fault of the person charged with responsibility for it. The common-law liability of the carrier and of the innkeeper, of course, did not arise out of a mere personal relation. Both pursue a public calling, one charged with a public interest, and therefore peculiarly subject to regu-

lation in the interest of the public. It was never the law, so far as we know, that private carriers or private boarding-house keepers, who are free to serve whom they will, under such contracts as they may please to make, were liable as insurers to their patrons or guests. The analogy between the responsibility for dangerous agencies and liability for inevitable accidents in industry as between the joint adventurers pursuing such industry for their mutual profit is so remote as to furnish no real aid in the solution of the present problem.

Statutes requiring railroad companies to fence their rights of way and upon their failure to do so imposing upon them liability for stock killed have been upheld. In such cases the liability is for breach of duty validly imposed, *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150, 158; in short, a liability for negligence. Black, Constitutional Law, 2d ed., p. 351. Laws imposing liability for stock killed without requiring the right of way to be fenced, on the other hand, create a liability without fault. Such laws have been universally condemned.

It is indeed significant that in the whole legal history of individual liability there has been such a consistent aversion to the establishment of a liability without fault. It cannot be accounted for upon any other theory than that the principle itself is repugnant to the fundamental rights of liberty and property on which our institutions are founded. This rule of individual liability is one of the rules which the legislature is "prevented by constitutional limitations" from changing at its whim. *Munn* v. *Illinois*, 94 U. S. 113. It seems plain, therefore, that this law is a mere labor law, concerned only with the rights of individuals, and that as such it is clearly void.

The police power of the State is not without limitation. *Lawton* v. *Steele*, 152 U. S. 133, 137. The first inquiry here is whether the law deals with a subject-matter of public as distinguished from private concern; the second is

whether the measure is reasonably necessary and appropriate to achieve the public end sought. *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 238; *New York Central R. R. Co.* v. *White*, 243 U. S. 188, 207. Not every law that deals with a proper subject-matter of police regulation is to be construed as a police measure or is to be held valid as such. *Lochner* v. *New York*, 198 U. S. 45, 57.

The compensation systems considered by this court in the *White*, *Hawkins* and *Mountain Timber Company Cases*, regulate in a most thoroughgoing manner and in the interest of the public the whole subject-matter of compensation for industrial injury and death. The Arizona law has nothing in common with these laws. It does not regulate anything. As aptly remarked by Justice Ross in his dissent in this case, "Ours is not a system but a lawsuit."

It seems to us that the Arizona law is in no sense a police measure. However, if we treat it as such simply because it deals with a subject which may be regulated in the interest of the public, it follows from what the court has said (*New York Central R. R. Co.* v. *White*, 243 U. S. 188, 206), that it must be set aside as invalid unless it can be supported as an appropriate and proper exercise of the police power.

The extent of the public interest must mark the extreme limit of permissible interference with the private rights of the parties. The regulation of the relation of master and servant and of the compensation to be paid the servant in case of injury are conceivably matters of public concern, for the reason that, if the burden of injury losses is to fall on the workman, the injured man and his dependents are certain, in a considerable number of instances, to be pauperized and to be driven into vice and crime. *New York Central R. R. Co.* v. *White*, 243 U. S. 188, 207. The public is concerned, in the first place, with

the method by which compensation is secured, to the end that it shall be fairly estimated and promptly paid, without burdensome expenses and friction between employer and employee. In the second place, the public is concerned with the amount of compensation so that the award shall be sufficient to protect the workman and his dependents against poverty and its attendant evils. This two-fold interest of the public must find appropriate expression in any law which can be sustained as a police regulation.

The first can be achieved only by abolishing litigation and establishing a just system of compensation. In the second place, as it is a matter of public concern that the award shall be sufficient to prevent pauperism and its evils, it is of equal concern that the award shall not exceed what is reasonably necessary to protect the workman and his dependents in these respects.

The physical hurt must be borne by the injured person; it cannot be shifted. *New York Central R. R. Co.* v. *White*, 243 U. S. 188, 203. Neither can the physical hurt be measured in terms of money. A law which authorizes an award of damages for pain and suffering and kindred elements does not serve the public interest. It does, however, open wide the door for speculative verdicts, which bear no true relation to the public interest or to the pecuniary loss sustained by the injured man. Neither can there be any suggestion of public concern in saddling upon the industry, or upon a particular employer, an unlimited liability to the estate of a deceased workman who has left no one dependent upon his labors, and therefore no one who has suffered pecuniary loss by his death.

This court, in the compensation cases, has expressly refrained from specifying the legal limits of permissible compensation under compensation laws. Nevertheless, the decisions make it clear that compensation must be based upon earnings, and cannot be allowed for specula-

tive elements such as are included in the damages awarded under the Arizona law. It is equally manifest from these decisions that the rate of compensation must be certain or ascertainable on some definite basis and that it must be limited in amount. These restrictions follow logically from the court's conception of the compensation system as disregarding the immediate cause of the accident and as treating the employment itself for which employer and employee are jointly responsible as the true cause of the injury.

The Arizona law is as inconsistent with this conception as is the common law. It relieves the employer of none of the evils of the common law, but saddles upon him a new lawsuit for damages according to common-law standards, where he has exercised the utmost human care, and, in addition, penalizes him 12 per cent. of the jury's award if he fails on appeal.

Mr. Graham Foster, for defendant in error in No. 332, submitted. *Mr. Hugh M. Foster* and *Mr. George F. Senner* were on the brief.

Mr. Cleon T. Knapp, for plaintiff in error in No. 334, submitted:

If there is any justification for the enactment of such a law it must be found in the police power. This court has repeatedly recognized the difficulty of exactly defining that power. It is generally recognized as the right of a State to legislate for its general welfare and betterment. The extent to which it may be exercised is dependent largely upon industrial and social conditions. Each exercise must be measured of itself. *Noble State Bank* v. *Haskell*, 219 U. S. 104; *Camfield* v. *United States*, 167 U. S. 518.

The police power cannot be used in an arbitrary manner, calculated to deprive one of private rights. While it

"extends to all great public needs" those same public needs place a limitation upon its valid exercise. The rule of reason must be applied. *Hurtado* v. *California*, 110 U. S. 516; *Hayes* v. *Missouri*, 120 U. S. 68; *Missouri Pacific Ry. Co.* v. *Mackey*, 127 U. S. 205; *Hallinger* v. *Davis*, 146 U. S. 314; *Holden* v. *Hardy*, 169 U. S. 366; *Barbier* v. *Connolly*, 113 U. S. 27. The power cannot be used as an excuse for unjust and oppressive legislation. *Davidson* v. *New Orleans*, 96 U. S. 97; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

The question presented then is whether this law is calculated to benefit the public needs. And the test to be applied is not the mere wording, but whether in practice it would actually accomplish an object beneficial to the health, safety and general welfare. *Lochner* v. *New York*, 198 U. S. 45.

The Arizona Employers' Liability Law is in no way designed to benefit either the health, safety or general welfare. If it were designed to benefit the health and safety of employees it would be beneficial to public welfare. But it is not. If it removed existing ills in present social, industrial, or economic conditions in Arizona, it might, under certain circumstances, be beneficial to public welfare. But it does not. It adds to existing ills.

If any justification can be found for the law, it must be upon reasons supporting the legality of compulsory compensation acts. And it is solely upon such grounds that the Arizona Supreme Court attempted to justify its legality.

We assume that the decisions of this court in the *White*, *Hawkins*, and *Mountain Timber Company Cases* cover the field of justification for enactment of compensation laws. And if there is justification for this law, it must be found in the reasons there given. The decisions in those cases are influenced by the consideration that the legislature in the enactment of those laws substituted a substantial

equivalent. Our quarrel with the Arizona law is not so much that it abrogates the common-law rules of liability as that it absolutely fails to set up something adequate in their stead. It cannot be justified upon any of the grounds supporting the legality of compensation acts. It is not a "method of compensation." It is a suit for damages. It preserves the jury system of awarding damages in an unlimited amount, and should the employer be presumptuous enough to appeal, he is what might be called fined, by being assessed interest on the judgment at 12 per cent. The New York law was not pronounced arbitrary and unreasonable, for the reason that the compensation was moderate and definite. Under this law, judged by its history, the awards will never be moderate and never definite. It provides for damages not alone for loss of earning power, but for pain, suffering, mental and physical anguish, and humiliation, and the jury is quick to consider all such elements.

No evil attendant upon the old personal injury litigation has been removed. The law's delay, the court expense, the large attorney fee, the oft-times miscarriage of justice by inadequate verdicts, and more often by excessive verdicts, the bitterness growing from litigation; all these and many more are still attendant upon the trail of this law. Every reason prompting the enactment of compensation laws is lacking to support it. It is not designed in the remotest way to protect health, safety or public welfare. It is not a valid exercise of police power. The Arizona Supreme Court vainly searched for authorities to justify the constitutionality of the law, and was forced to base its decision entirely upon the reasons given in the *White Case* upholding the New York Compensation Law.

Mr. Samuel Herrick, for defendant in error in No. 334, submitted.

MR. JUSTICE PITNEY delivered the opinion of the court.

In each of these cases, a workman in a hazardous industry in the State of Arizona, having received in the course of his employment a personal injury through an accident due to a condition or conditions of the occupation, not caused by his own negligence or so far as appears by that of his employer or others, brought action under the Employers' Liability Law of Arizona, and recovered compensatory damages against the employer ascertained upon a consideration of the nature, extent, and disabling effects of the injury in each particular case. And the question is raised whether the statute referred to, as applied to the facts of these cases, is repugnant to that provision of the Fourteenth Amendment which declares that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Art. XVIII of the constitution of the State of Arizona is entitled "Labor," and contains, among others, the following sections:

"SECTION 4. The common law doctrine of fellow servants, so far as it affects the liability of a master for injuries to his servants resulting from the acts or omissions of any other servant or servants of the common master is forever abrogated.

"SECTION 5. The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.

"SECTION 6. The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.

"SECTION 7. To protect the safety of employees in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or any other industry the Legislature shall enact an Employers' Lia-

bility law, by the terms of which any employer, whether individual, association, or corporation shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

"SECTION 8. The Legislature shall enact a Workmen's Compulsory Compensation law applicable to workmen engaged in manual or mechanical labor in such employments as the Legislature may determine to be especially dangerous, by which compulsory compensation shall be required to be paid to any such workman by his employer, if in the course of such employment personal injury to any such workmen from any accident arising out of, and in the course of, such employment is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents, or employee, or employees, to exercise due care, or to comply with any [law?] affecting such employment; Provided, that it shall be optional with said employee to settle for such compensation, or retain the right to sue said employer as provided by this Constitution."

Pursuant to § 7 the Employers' Liability Law was enacted (c. 89, Laws 1912, Reg. Sess.; Arizona Rev. Stats. 1913, pars. 3153–3162); pursuant to § 8 a Workmen's Compulsory Compensation Law was enacted (c. 14, Laws 1912, 1st Spec. Sess.; Arizona Rev. Stats. 1913, pars. 3163, *et seq.*).

In two of the present cases the former law was sustained by the Supreme Court of Arizona against attacks based upon the Fourteenth Amendment. *Inspiration Consolidated Copper Co.* v. *Mendez*, 19 Arizona, 151; *Superior &*

Pittsburg Copper Co. v. *Tomich*, 19 Arizona, 182. In the three other cases it was sustained by the United States District Court for that District. And the resulting judgments in favor of the injured workmen are brought under our review by writs of error.

Some of the arguments submitted to us assail the wisdom and policy of the act because of its novelty, because of its one-sided effect in depriving the employer of defenses while giving him (as is said) nothing in return, leaving the damages unlimited, and giving to the employee the option of several remedies; as tending not to obviate but to promote litigation; and as pregnant with danger to the industries of the State. With such considerations this court can not concern itself. Novelty is not a constitutional objection, since under constitutional forms of government each State may have a legislative body endowed with authority to change the law. In what respects it shall be changed, and to what extent, is in the main confided to the several States; and it is to be presumed that their legislatures, being chosen by the people, understand and correctly appreciate their needs. The States are left with a wide range of legislative discretion, notwithstanding the provisions of the Fourteenth Amendment; and their conclusions respecting the wisdom of their legislative acts are not reviewable by the courts.

We have been called upon recently to deal with various forms of workmen's compensation and employers' liability statutes. *Second Employers' Liability Cases*, 223 U. S. 1, 47–53; *New York Central R. R. Co.* v. *White*, 243 U. S. 188, 196, *et seq.*; *Hawkins* v. *Bleakly*, 243 U. S. 210; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219; *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152. These decisions have established the propositions that the rules of law concerning the employer's responsibility for personal injury or death of an employee arising in the course of the employment are not beyond alteration by legislation in

the public interest; that no person has a vested right entitling him to have these any more than other rules of law remain unchanged for his benefit; and that, if we exclude arbitrary and unreasonable changes, liability may be imposed upon the employer without fault, and the rules respecting his responsibility to one employee for the negligence of another and respecting contributory negligence and assumption of risk are subject to legislative change.

The principal contention is that the Arizona Employers' Liability Law deprives the employer of property without due process of law, and denies to him the equal protection of the laws, because it imposes a liability without fault, and, as is said, without equivalent protection. The statute, in respect of certain specified employments designated as inherently hazardous and dangerous to workmen—and reasonably so described—imposes upon the employer, without regard to the question of his fault or that of any person for whose conduct he is responsible, a liability in compensatory damages—excluding all such as are speculative or punitive (*Arizona Copper Co.* v. *Burciaga*, 177 Pac. Rep. 29)—for accidental personal injury or death of an employee arising out of and in the course of the employment and due to a condition or conditions of the occupation, in cases where such injury or death of the employee shall not have been caused by his own negligence. This is the substance of pars. 3154 and 3158, and they are to be read in connection with par. 3156, which declares what occupations are hazardous within the meaning of the law. By par. 3160, contracts and regulations exempting the employer from liability are declared to be void.

In effect, the statute requires the employer, instead of the employee, to assume the pecuniary risk of injury or death of the employee attributable to hazards inherent in the employment and due to its conditions and not to the negligence of the employee killed or injured. In deter-

mining whether this departure from the previous rule is so arbitrary or inconsistent with the fundamental rights of the employer as to render the law repugnant to the Fourteenth Amendment, it is to be borne in mind that the matter of the assumption of the risks of employment and the consequences to flow therefrom has been regulated time out of mind by the common law, with occasional statutory modifications. The rule existing in the absence of statute, as usually enunciated, is that all consequences of risks inherent in the occupation and normally incident to it are assumed by the employee and afford no ground of action by him or those claiming under him, in the absence of negligence by the employer; and even risks arising from or increased by the failure of the employer to take the care that he ought to take for the employee's safety are assumed by the latter if he is aware of them or if they are so obvious that any ordinarily prudent person under the circumstances could not fail to observe and appreciate them; but if the employee, having become aware of a risk arising out of a defect attributable to the employer's negligence, makes complaint or objection and obtains a promise of reparation, the common law brings into play a new set of regulations, requiring the employer to assume the risk under certain circumstances, the employee under others. *Seaboard Air Line Ry.* v. *Horton*, 233 U. S. 492, 504, 505; 239 U. S. 595, 598, 599; and cases cited.

But these are no more than rules of law, deduced by the courts as reasonable and just, under the conditions of our civilization, in view of the relations existing between employer and employee *in the absence of legislation.* They are not placed, by the Fourteenth Amendment, beyond the reach of the State's power to alter them, as rules of future conduct and tests of responsibility, through legislation designed to promote the general welfare, so long as it does not interfere arbitrarily and unreasonably, and in

defiance of natural justice, with the right of employers and employees to agree between themselves respecting the terms and conditions of employment.

We are unable to say that the Employers' Liability Law of Arizona, in requiring the employer in hazardous industries to assume—so far as pecuniary consequences go—the entire risk of injury to the employee attributable to accidents arising in the course of the employment and due to its inherent conditions, exceeds the bounds of permissible legislation or interferes with the constitutional rights of the employer. The answer that the common law makes to the hardship of requiring the employee to assume all consequences, both personal and pecuniary, of injuries arising out of the ordinary dangers of the occupation is that the parties enter into the contract of employment with these risks in view, and that the consequences ought to be, and presumably are, taken into consideration in fixing the rate of wages. *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Ross*, 112 U. S. 377, 383; *Northern Pacific R. R. Co.* v. *Herbert*, 116 U. S. 642, 647; *New York Central R. R. Co.* v. *White*, 243 U. S. 188, 199; *Farwell* v. *Boston & Worcester R. R. Corp.*, 4 Metc. 49, 57. In like manner the employer, if required—as he is by this statute in some occupations—to assume the pecuniary loss arising from such injury to the employee, may take this into consideration in fixing the rate of wages; besides which he has an opportunity, which the employee has not, to charge the loss as a part of the cost of the product of the industry.

There is no question here of punishing one who is without fault. That, we may concede, would be contrary to natural justice. But, as we have seen, the statute limits the recovery strictly to compensatory damages. And there is no discrimination between employer and employee except such as necessarily arises from their different relations to the common undertaking. Both are essential

to it, the one to furnish capital, organization, and guidance, the other to perform the manual work; both foresee that the occupation is of such a nature, and its conditions such, that sooner or later some of the workmen will be physically injured or maimed, occasionally one killed, without particular fault on anybody's part. (See 243 U. S. 203.) The statute requires that compensation shall be paid *to* the injured workman or his dependents, because it is upon them that the first brunt of the loss falls; and that it shall be paid *by* the employer, because he takes the gross receipts of the common enterprise, and by reason of his position of control can make such adjustments as ought to be and practically can be made, in the way of reducing wages and increasing the selling price of the product, in order to allow for the statutory liability. There could be no more rational basis for a discrimination; and it is clear that in this there is no denial of the "equal protection of the laws."

Under the "due process" clause, the ultimate contention is that men have an indefeasible right to employ their fellow men to work under conditions where, as all parties know, from time to time some of the workmen inevitably will be killed or injured, but where nobody knows or can know in advance which particular men or how many will be the victims, or how serious will be the injuries, and hence no adequate compensation can be included in the wages; and to employ them thus with the legitimate object of making a profit above their wages if all goes well, but with immunity from particular loss if things go badly with the workmen through no fault of their own, and they suffer physical injury or death in the course of their employment. In view of the subject-matter, and of the public interest involved, we cannot assent to the proposition that the rights of life, liberty, and property guaranteed by the Fourteenth Amendment prevent the States from modifying that rule of the common law

which requires or permits the workingman to take the chances in such a lottery.

The act—assuming, as we must, that it be justly administered—adds no new burden of cost to industry, although it does bring to light a burden that previously existed but perhaps was unrecognized, by requiring that its costs be taken into the reckoning. The burden is due to the hazardous nature of the industry, and is inevitable if the work of the world is to go forward. What the act does is merely to require that it shall be assumed, to the extent of a pecuniary equivalent of the actual and proximate damage sustained by the workman or those near to him, by the employer—by him who organizes the enterprise, hires the workmen, fixes the wages, sets a price upon the product, pays the costs, and takes for his reward the net profits, if any.

The interest of the State is obvious. We declared in the *White Case* (243 U. S. 207): "It cannot be doubted that the State may prohibit and punish self-maiming and attempts at suicide; it may prohibit a man from bartering away his life or his personal security; indeed, the right to these is often declared, in bills of rights, to be 'natural and inalienable'; and the authority to prohibit contracts made in derogation of a lawfully established policy of the State respecting compensation for accidental death or disabling personal injury is equally clear. . . . This statute does not concern itself with measures of prevention, which presumably are embraced in other laws. But the interest of the public is not confined to these. One of the grounds of its concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime. And, in our opinion, laws regulating the responsibility of employers for the injury or death of employees arising out of the employment bear so close a relation to the protection of the lives and safety of those

concerned that they properly may be regarded as coming within the category of police regulations." (Citing cases.)

And in *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 239, it was said: "Certainly, the operation of industrial establishments that in the ordinary course of things frequently and inevitably produce disabling or mortal injuries to the human beings employed is not a matter of wholly private concern."

Having this interest, the State of Arizona reasonably might say: "The rule of the common law requiring the employee to assume all consequences of personal injuries arising out of the ordinary dangers and normal conditions of a hazardous occupation, and to secure his indemnity in advance in the form of increased wages, is incompatible with the public interest because—assuming that workmen are on an equality with employers in a negotiation about the rate of wages—the probability of injury occurring to a particular employee, and the nature and extent of such injury, are so contingent and speculative that it is impracticable for either employer or employee approximately to estimate in advance how much allowance should be made for them in the wages; and even were a proper allowance made, experience demonstrates that under our conditions of life it is not to be expected that the average workingman will set aside out of his wages a proper insurance against the time when he may be injured or killed. Hence, recognizing that injuries to workmen constitute a part of the unavoidable cost of hazardous industries, we will require that it be assumed by the one in control of the industry as employer, just as he pays other items of cost; so that he shall not take a profit from the labor of his employees while leaving the injured ones, and the dependents of those whose lives are lost, through accidents due to the conditions of the occupation, to be a burden upon the public."

Whether this or similar reasoning was employed, we

have no means of knowing; whether, if employed, it ought to have been accepted as convincing, is not for us to decide. It being incumbent upon the opponents of the law to demonstrate that it is clearly unreasonable and arbitrary, it is sufficient for us to declare, as we do, that such reasoning would be pertinent to the subject and not so unfounded or irrational as to permit us to say that the State, if it accepted it as a basis for changing the law in a matter so closely related to the public welfare, exceeded the restrictions placed upon its action by the Fourteenth Amendment.

It is objected that the responsibility of the employer under this statute is unlimited; but this is not true except as it is true of every action for compensatory damages where the amount awarded varies in accordance with the nature and extent of the damages for which compensation is made. It is said that in actions by employees against employers juries are prone to render extravagant verdicts. The same thing has been said, and with equal reason, concerning actions brought by individuals against railroad companies, traction companies, and other corporations. In this, as in other cases, there is a corrective in the authority of the court to set aside an exorbitant verdict. And it amounts to a contradiction of terms to say that in submitting a controversy between litigants to the established courts, there to be tried according to long-established modes and with a constitutional jury to determine the issues of fact and assess compensatory damages, there is a denial of "due process of law."

Much stress is laid upon that part of our opinion in the *White Case* where, after citing numerous previous decisions upholding the authority of the States to establish by legislation departures from the fellow-servant rule and other common-law rules affecting the employer's liability for personal injuries to the employee, we said (243 U. S. 201): "It is true that in the case of the statutes thus

sustained there were reasons rendering the particular departures appropriate. Nor is it necessary, for the purposes of the present case, to say that a State might, without violence to the constitutional guaranty of 'due process of law,' suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute. . . . No such question is here presented, and we intimate no opinion upon it. The statute under consideration sets aside one body of rules only to establish another system in its place," etc.

In spite of our declaration that no opinion was intimated, this is treated as an intimation that a statute such as the one now under consideration, creating a new and additional right of action and allowing no defense (if the conditions of liability be shown) unless the accident was caused by the negligence of the injured employee, would be regarded as in conflict with the due process clause. We cannot, however, regard this statute as anything else than a substitute for the law as it previously stood; whether it be a proper substitute was for the people of the State of Arizona to determine; but we find no ground for declaring that they have acted so arbitrarily, unreasonably, and unjustly as to render their action void. They have resolved that the consequences of a personal injury to an employee attributable to the inherent dangers of the occupation shall be assumed, not wholly by the particular employee upon whom the personal injury happens to fall, but, to the extent of a compensation in money awarded in a judicial tribunal according to the ordinary processes of law, shall be assumed by the employer; leaving the latter to charge it up, so far as he can, as a part of the cost of his product, just as he would charge a loss by fire, by theft, by bad debts, or any other usual loss of the business; and to make allowance for it, so far as he can, in a reduced scale of wages. And they have come to this resolution, we repeat, not in a matter of in-

difference, or upon a question of mere economics, but in the course of regulating the conduct of those hazardous industries in which human beings—their own people—in the pursuit of a livelihood must expose themselves to death or to physical injuries more or less disabling, with consequent impoverishment, partial or total, of the workman or those dependent upon him. The statute says to the employer, in effect: "You shall not employ your fellow men in a hazardous occupation for gain, you being in a position to reap a reward in money through selling the product of their toil, unless you come under an obligation to make appropriate compensation in money in case of their death or injury due to the conditions of the occupation." The rule being based upon reasonable grounds affecting the public interest, being established in advance and applicable to all alike under similar circumstances, there is, in our opinion, no infringement of the fundamental rights protected by the Fourteenth Amendment.

Some expressions contained in our opinion in the *White Case* (243 U. S. 203, 204, 205,) are treated in argument as if they were equivalent to saying that if a State, in making a legislative adjustment of employers' liability, departs from the common-law system of basing responsibility upon fault, it must confine itself to a limited compensation, measured and ascertained according to the methods adopted in the compensation acts of the present day. Of course nothing of the kind was intended. In a previous part of the opinion (pp. 196–200) it had been shown that the employer had no constitutional right to continued immunity from liability in the absence of negligence, nor to have the fellow-servant rule and the rules respecting contributory negligence and assumption of risk remain unchanged. The statutory plan of compensation for injured workmen and the dependents of those fatally injured—an additional feature at variance with the common law—was then upheld; but, of course, without

saying that no other would be constitutional. For if, as we held in that case, the novel statutory scheme of awarding compensation according to a prearranged scale is sustainable, it follows, perhaps *a fortiori*, that the Arizona method of ascertaining the compensation according to the facts of each particular case—substantially the common law method—is free from objection on constitutional grounds. Indeed, if a State recognizes or establishes a right of action for compensation to injured workmen upon grounds not arbitrary or fundamentally unjust, the question whether the award shall be measured as compensatory damages are measured at common law, or according to some prescribed scale reasonably adapted to produce a fair result, is for the State itself to determine. Whether the compensation should be paid in a single sum after judgment recovered, as is required by the Arizona Employers' Liability Law just as under the common law system in the case of a judgment based upon negligence, or whether it would be more prudent to distribute the award by instalment payments covering the period of disability or of need, likewise is for the State to determine, and upon this the plaintiffs in error can raise no constitutional question.

To the suggestion that the act now or hereafter may be extended by construction to non-hazardous occupations, it may be replied: first, that the occupations in which these actions arose were indisputably hazardous, hence plaintiffs in error have no standing to raise the question (*Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544; *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 576; *Hendrick* v. *Maryland*, 235 U. S. 610, 621; *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152, 157); and secondly, it hardly is necessary to add that employers in non-hazardous industries are in little danger from the act, since it imposes liability only for accidental injuries attributable to the inherent dangers of the occupation.

To the objection that the benefits of the act may be extended, in the case of death claims, to those not nearly related to or dependent upon the workman, or even may go by escheat to the State, it is sufficient to say that no such question is involved in these records; in *Arizona Copper Co.* v. *Burciaga*, 177 Pac. Rep. 29, a case of personal injuries not fatal, the Supreme Court of Arizona interpreted the act as limiting the recovery to compensatory damages; it reasonably may be so construed in its application to death claims; and it would be improper for this court to assume in advance that the state court will place such a construction upon the statute as to render it obnoxious to the Federal Constitution. *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 546; *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, 369.

It is insisted that the Arizona system deprives employers of property without due process of law and denies them equal protection because it confers upon the employee a free choice among several remedies. In *Consolidated Arizona Smelting Co.* v. *Ujack*, 15 Arizona, 382, 384, the Supreme Court of the State said: "Under the laws of Arizona, an employee who is injured in the course of his employment has open to him three avenues of redress, any one of which he may pursue according to the facts of his case. They are: (1) The common-law liability relieved of the fellow-servant defense and in which the defenses of contributory negligence and assumption of risk are questions to be left to the jury. Const., secs. 4, 5, art. 18. (2) Employers' liability law, which applies to hazardous occupations where the injury or death is not caused by his own negligence. Const., sec. 7, art. 18. (3) The compulsory compensation law, applicable to especially dangerous occupations, by which he may recover compensation without fault upon the part of the employer. Const., sec. 8, art. 18." It is said by counsel that the compensation act, because it limits the recovery,

never is resorted to in practice unless the employee has been negligent and hence is debarred of a remedy under the liability act. But it is thoroughly settled by our previous decisions that a State may abolish contributory negligence as a defense; and election of remedies is an option very frequently given by the law to a person entitled to an action; an option normally exercised to his own advantage, as a matter of course.

Other points are suggested, but none requiring particular discussion.

Judgments affirmed.

MR. JUSTICE HOLMES concurring.[1]

The plaintiff (the defendant in error) was employed in the defendant's mine, was hurt in the eye in consequence of opening a compressed air valve and brought the present suit. The injury was found to have been due to risks inherent to the business and so was within the Employers' Liability Law of Arizona, Rev. Stats. 1913, Title 14, c. 6. By that law as construed the employer is liable to damages for injuries due to such risks in specified hazardous employments when guilty of no negligence. Par. 3158. There was a verdict for the plaintiff, judgment was affirmed by the Supreme Court of the State, 19 Arizona, 151, and the case comes here on the single question whether, consistently with the Fourteenth Amendment, such liability can be imposed. It is taken to exclude "speculative, exemplary and punitive damages," but to include all loss to the employee caused by the accident, not merely in the way of earning capacity, but of disfigurement and bodily or mental pain. See *Arizona Copper Co.* v. *Burciaga*, 177 Pac. Rep. 29, 33.

There is some argument made for the general proposi-

[1] This concurring opinion was delivered in one of the five cases, viz, No. 332, *Inspiration Consolidated Copper Company* v. *Mendez*.

tion that immunity from liability when not in fault is a right inherent in free government and the *obiter dicta* of Mr. Justice Miller in [*Citizens' Savings &*] *Loan Association* v. *Topeka*, 20 Wall. 655, are referred to. But if it is thought to be public policy to put certain voluntary conduct at the peril of those pursuing it, whether in the interest of safety or upon economic or other grounds, I know of nothing to hinder. A man employs a servant at the peril of what that servant may do in the course of his employment and there is nothing in the Constitution to limit the principle to that instance. *St. Louis & San Francisco Ry. Co.* v. *Mathews*, 165 U. S. 1, 22. *Chicago, Rock Island & Pacific Ry. Co.* v. *Zernecke*, 183 U. S. 582, 586. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor*, 210 U. S. 281, 295. See *Guy* v. *Donald*, 203 U. S. 399, 406. There are cases in which even the criminal law requires a man to know facts at his peril. Indeed, the criterion which is thought to be free from constitutional objection, the criterion of fault, is the application of an external standard, the conduct of a prudent man in the known circumstances, that is, in doubtful cases, the opinion of the jury, which the defendant has to satisfy at his peril and which he may miss after giving the matter his best thought. *The Germanic*, 196 U. S. 589, 596. *Nash* v. *United States*, 229 U. S. 373, 377. *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600, 610. *Miller* v. *Strahl*, 239 U. S. 426, 434. Without further amplification so much may be taken to be established by the decisions. *New York Central R. R. Co.* v. *White*, 243 U. S. 188, 198, 204. *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 336.

I do not perceive how the validity of the law is affected by the fact that the employee is a party to the venture. There is no more certain way of securing attention to the safety of the men, an unquestionably constitutional object of legislation, than by holding the employer liable

for accidents. Like the crimes to which I have referred they probably will happen a good deal less often when the employer knows that he must answer for them if they do. I pass, therefore, to the other objection urged and most strongly pressed. It is that the damages are governed by the rules governing in action of tort—that is, as we have said, that they may include disfigurement and bodily or mental pain. Natural observations are made on the tendency of juries when such elements are allowed. But if it is proper to allow them of course no objection can be founded on the supposed foibles of the tribunal that the Constitution of the United States and the States have established. Why then, is it not proper to allow them? It is said that the pain cannot be shifted to another. Neither can the loss of a leg. But one can be paid for as well as the other. It is said that these elements do not constitute an economic loss, in the sense of diminished power to produce. They may. *Ball* v. *William Hunt & Sons*, Ltd., [1912], A. C. 496. But whether they do or not they are as much part of the workman's loss as the loss of a limb. The legislature may have reasoned thus. If a business is unsuccessful it means that the public does not care enough for it to make it pay. If it is successful the public pays its expenses and something more. It is reasonable that the public should pay the whole cost of producing what it wants and a part of that cost is the pain and mutilation incident to production. By throwing that loss upon the employer in the first instance we throw it upon the public in the long run and that is just. If a legislature should reason in this way and act accordingly it seems to me that it is within constitutional bounds. *Erickson* v. *Preuss*, 223 N. Y. 365. It is said that the liability is unlimited, but this is not true. It is limited to a conscientious valuation of the loss suffered. Apart from the control exercised by the judge it is to be hoped that juries would realize that unreasonable verdicts would tend to

make the business impossible and thus to injure those whom they might wish to help. But whatever they may do we must accept the tribunal, as I have said, and are bound to assume that they will act rightly and confine themselves to the proper scope of the law.

It is not urged that the provision allowing twelve per cent. interest on the amount of the judgment from the date of filing the suit, in case of an unsuccessful appeal, is void. *Fidelity Mutual Life Association* v. *Mettler*, 185 U. S. 308, 325–327. *Consaul* v. *Cummings*, 222 U. S. 262, 272.

MR. JUSTICE BRANDEIS and MR. JUSTICE CLARKE concur in this statement of additional reasons that lead me to agree with the opinion just delivered by my brother PITNEY.

MR. JUSTICE McKENNA dissenting.

I find myself unable to concur, yet reluctant to dissent. The case is of the kind that, once pronounced, will be a rule in like or cognate cases forever,—indeed, may even be extended. It is said to rest on the cases sustaining the workmen's compensation law of New York, 243 U. S. 188, and its associated cases in the same volume upholding like laws of other States. The present case certainly comes after those cases and has that symptom of being their sequence. They cannot be said to have been easy of judgment against the contentions and conservatism which opposed them, and there was, at least to me, no prophecy of their extent, and therefore to me the present case is a step beyond them. I hope it is something more than timidity, dread of the new, that makes me fear that it is a step from the deck to the sea—the metaphor suggests a peril in the consequences.

But let me in a more concrete way make application of this comment. I may assume that the purpose and principle and general extent of workmen's compensation laws

are known. I must rest on that assumption for even an epitome of them or the reasons for them would unduly extend this dissent. The Arizona law has no resemblance to them. It is a direct charge of liability upon the employer for death or injury incurred in his employment, he being without fault. Its remedies are the ordinary legal remedies; its measure of relief, however, has in it something more than the ordinary measures of relief, certainly not those of the compensation laws, nor is it as considerate and guarded as they. If its validity, therefore, can be deduced from the cases explanatory of those laws, it can only be done by bringing its instances and theirs under the same generalization, that is, that it is competent for government to charge liability and exempt from responsibility according as one is employer or employee, there being no other circumstance than that relation. Of this there can be no disguise. It may be confused by argument and attempt at historical analogies and deductions, but to that comprehensive principle the case must come at last. All else is adventitious and puts out of view the relation of the factors of production. It puts out of view that employers are as necessary to production as employees, and subjects to peril the voluntary conduct of the former and leaves out of account as an element the voluntary conduct of the latter. In other words, there is a clear discrimination,—a class distinction with its legal circumstances and, I may say, invidious circumstances, in view of some of the reasons adduced in its justification. And these effects cannot be concealed under any camouflage nor given the plausible and attractive gloss of public policy, justified by the different conditions of employer and employee. Unquestionably there is a difference—it constitutes the life of the relation. But the question is, Who shall compensate the injury that may result from the relation, voluntary assumed by both, urged by their respective interests and a calculation of advantage?

But I pass this discrimination and return to the law as a violation of the employer's rights considered absolutely and abstractly. It seems to me to be of the very foundation of right—of the essence of liberty as it is of morals—to be free from liability if one is free from fault. It has heretofore been the sense of the law and the sense of the world, pervading the regulations of both, that there can be no punishment where there is no blame; and yet the court now by its decision erects the denial of these postulates of conduct into a principle of law and governmental policy. In other words, it is said to be a benefit to government to put the exact discharge of duty under the menace of penalty and invert the conceptions of mankind of the relation of right and wrong action. If the legislation does not punish without fault what does it do? The question is pertinent. Consider what the employer does: he invests his money in productive enterprise—mining, smelting, manufacturing, railroading—he engages employees at their request and pays them the wages they demand, he takes all of the risks of the adventure. Now there is put upon him an immeasurable element that may make disaster inevitable. I find it difficult to answer the argument advanced to support or palliate this effect or independently of it to justify the interference with rights. It is a certain impeachment of some rights to assume that they need justification and a betrayal of them to make them a matter of controversy. There are precepts of constitutional law as there are precepts of moral law that reach the conviction of aphorisms and are immediately accepted by all who understand them, and comment is considered as confusing as unnecessary. I say this, not in dogmatism, but in expression of my vision of things, and I say it with deference to the contrary judgments of my brethren of the majority.

Of course, reasons may be found for the violation of rights, advantage to somebody or something in that viola-

tion. Tyranny even may find pretexts and seldom boldly bids its will avouch its acts, and certainly there can be no accusation of bare-faced power in the Arizona law. Its motives and purposes are worthy and it requires some resolution of duty to resist them. It must be seen and is seen, however, that the difference between the position of employer and employee, simply considering the latter as economically weaker, is not a justification for the violation of the rights of the former, and that individual rights cannot be made to yield to philanthropy, and therefore the welfare of the government is brought forward and displayed. The law saves the government, is the comment, from the burden of paupers, its administration and peace from the disturbance of criminals. The answer, I think, is immediate. Government, certainly constitutional government, cannot afford to infringe, indeed, betrays its purpose if it infringes, a right of anybody upon money considerations or for ease in the exercise of its faculties.

But granting that there is something in the argument, what shall be the limits of its application? Will it extend the principle of the present case to non-hazardous employments? If not, why not? The Arizona law stops with certain occupations which it calls "hazardous," but it includes in the description "manufacturing" without qualifying words. In the New York compensation law passed on in *New York Central R. R. Co.* v. *White*, 243 U. S. 188, there were forty-two groups of hazardous occupations. In *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, the court had quite a struggle with the provisions of the Washington compensation law, which was so far different from those of the other cases as to incur the dissent of members of the court. It is now, I think, of pertinent inquiry whether the quality of being hazardous is an inherent and necessary element of legality or a matter of legislative definition and policy. Besides, if there can be

liability without fault in one occupation, and that can be a principle of legislation, why not in any other? Who is to determine the application, court or legislature? If the latter, a court may not even express apprehension of its exercise, and yet it cannot put out of view the drift of events and in blind fatalism await their incidence when called upon to consider the legality of such exercise. We know things are in change—have changed—and a mark of it is that the drift of public opinion, and of legislation following opinion, is to alter the relation between employer and employee and to give to the latter a particular distinction, relieve him from a responsibility which would seem to be, and which until lately it has been the sense of the world to be, as much upon him as upon his employer, not in dependence, not as a mark of subservience, but as an obligation of his freedom, and, therefore as a consequence, that where he has liberty of action he has responsibility for action. In a word, the drift of opinion and legislation now is to set labor apart and to withdraw it from its conditions and from the action of economic forces and their consequences, give it immunity from the pitilessness of life. And there are appealing considerations for this drift of opinion and inevitable sympathy with it as with many other conditions, but which the law cannot relieve by a sacrifice of constitutional rights. In what legislation the drift (it is persuasion in some) may culminate cannot now be predicted, but it is very certain that, whatever it be, the judgment now delivered will be cited to justify it. Will it not be said that if one right of an employer can be made to give way, why not another?—made a condition "upon economic or other grounds" of his enterprise. Indeed, may not the question be made more general, and if in supposed benefit to a particular class, and through benefit to them to the public, there may be constraint upon or the imposition of burden upon one right of a citizen, why not upon another? There is, therefore, I

think, menace in the present judgment to all rights, subjecting them unreservedly to conceptions of public policy. If, however, this general apprehension be not justified, there is threat enough in the judgment of the court to the interest of employers generally as a result of the difference in conditions.

A rather curious argument is used to support the Arizona law. It is said, in justification of its discrimination between employer and employee, that the employer may in relief from it and rescue from its burdens pass them to the consumers of his products, as he does or may do in the case of other expenses of his venture, and in the long-run their incidence is, as it is said it should be, on the public, and that the legislature in so considering was reasoning within constitutional bounds. There is attractive speciousness in the argument. The individual employer seems to be devested of grievance and the problem the law presents to be one of economics and governmental policy; is a kind of taxation, an expense of government, the burden of which is properly laid upon the public and over which a court can have but limited power.

If it is intended by the argument to express no more than a tendency, while it has no relevancy, I think, upon the validity of the law, there may be no danger in it. If it is intended to be erected into a principle, there is danger in it. It is certainly facile and comprehensive. What burden can be put upon industry or the activities of men that may not be justified by it?

Of course, there will be no production unless all of its costs be reimbursed by the price of the articles produced. And by costs I mean as well the burdens of government as profit to the employer—his inducement to enterprise, and the wages of employees—their inducement to labor. Without such reimbursement there will be no production—and cannot be beyond a certain extent and for a certain time; and there is no way to effect it but through the con-

suming public. But recourse to such consumption as a rescue from the law is not a justification for the law, and it is very doubtful if it had any conscious influence in the enactment of the law.

Indeed, in the present case what could have been its influence and to what extent can it have an ameliorating effect? An employer in the indicated industries can have no relief except in the home market. If his products (where there are products) go beyond—go to other States —they will meet the competition of unburdened products. But this is obvious and needs no comment.

THE CHIEF JUSTICE, MR. JUSTICE VAN DEVANTER and MR. JUSTICE McREYNOLDS concur in this dissent.

MR. JUSTICE McREYNOLDS dissenting.

While I earnestly join in the dissent written by Mr. Justice McKenna, it seems not inappropriate to state my own views somewhat more fully. The important and underlying question is common to the five cases. Number 232 is typical and to detail certain facts and circumstances disclosed by the record therein may aid the discussion.

Basing his claim upon the Arizona Employers' Liability Law, Dan Veazey sued plaintiff in error in the United States District Court to recover damages for personal injuries received by him February 10, 1916, while engaged as millwright and carpenter in constructing a "flotation system" at the company's mill or reduction works in Gila County, Arizona "wherein steam, electricity and other mechanical power was then and there used to operate machinery." He alleged that while exercising due care he "suffered severe personal and bodily injuries by an accident arising out of and in course of such labor, service and employment, and due to a condition or conditions of such occupation or employment," which injuries were

not caused by his negligence but were sustained in the manner following: "Plaintiff in the due course of his said labor, service and employment was standing upon a certain timber or joist incorporated in said 'flotation system' engaged in bolting and fastening together the timbers thereof. That the said timber or joist upon which plaintiff was then and there standing was then and there elevated above the ground or floor of said mill or reduction works a distance of approximately ten feet. That while so engaged as aforesaid, plaintiff slipped from said timber or joist and fell to the ground . . . with great force and violence . . . ," was permanently injured and will forever remain sick, sore, lame and crippled.

No charge of negligence or failure to perform any duty was made against the company. It unsuccessfully set up and relied upon invalidity of the Employers' Liability Law because in conflict with the Fourteenth Amendment; judgment went against it; and the cause is here by writ of error to the trial court (Jud. Code, § 237).

Article XVIII of the Arizona Constitution provides:

"Section 4. The common law doctrine of fellow servants, so far as it affects the liability of a master for injuries to his servants resulting from the acts or omissions of any other servant or servants of the common master is forever abrogated.

"Section 5. The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.

"Section 6. The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.

"Section 7. To protect the safety of employees in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or any other industry the Legislature shall enact an Employer's Liability law, by the terms of which any employer,

whether individual, association, or corporation shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

"Section 8. The Legislature shall enact a Workmen's Compulsory Compensation law applicable to workmen engaged in manual or mechanical labor in such employments as the Legislature may determine to be especially dangerous, by which compulsory compensation shall be required to be paid to any such workman by his employer, if in the course of such employment personal injury to any such workman from any accident arising out of, and in the course of, such employment is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents, or employee, or employees, to exercise due care, or to comply with any [law] affecting such employment; Provided, that it shall be optional with said employee to settle for such compensation, or retain the right to sue said employer as provided by the Constitution."

Obeying the constitutional mandate, the legislature enacted the "Employers' Liability Law," approved May 24, 1912, (c. 89, Laws of Ariz., 1912, p. 491; Rev. Stats. Ariz., 1913, pars. 3153–3162) which provides:

That to protect the safety of workmen at manual or mechanical labor in many occupations declared hazardous and enumerated in § 4—among them all work in or about mines and in mills, shops, plants and factories where steam or electricity is used to operate machinery—every employer, whether individual, association or corporation "shall be liable for the death or injury, caused by any

accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured."

"Sec. 6. When in the course of work in any of the employments or occupations enumerated in Sec. 4 of this Act, personal injury or death by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be liable in damages to [the] employee injured, or, in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then to the next of kin dependent upon such employee, and if none, then to his personal representative, for the benefit of the estate of the deceased." Section 7 requires that questions of contributory negligence and assumption of risk shall be left to the jury. (The full text of the act is in the margin.[1])

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[1] Laws of Arizona, 1912, Chap. 89, p. 491; Rev. Stats., Ariz. Civil Code, 1913, pars. 3153–3162, p. 1051.

"Sec. 1. That this Act is and shall be declared to be an Employer's Liability law as prescribed in Sec. 7 of Article XVIII of the State Constitution.

"Sec. 2. That to protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway, transportation, or any other industry, as provided in said Sec. 7 of Article XVIII of the State Constitution, any employer, whether individual, association, or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such em-

Likewise, the legislature enacted a Compulsory Compensation Law, approved June 8, 1912, applicable to work-

ployer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

"Sec. 3. The labor and services of workmen at manual and mechanical labor, in the employment of any person, firm, association, company, or corporation, in the occupations enumerated in Sec. 4 of this Act are hereby declared and determined to be service in a hazardous occupation within the meaning of the terms of Sec. 2 of this Act.

"By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risks and hazards which are inherent in such occupations and which are unavoidable by the workmen therein.

" Sec. 4. The occupations hereby declared and determined to be hazardous within the meaning of this Act are as follows:

"1. The operation of steam railroads, electrical railroads, street railroads, by locomotives, engines, trains, motors, or cars of any kind propelled by steam, electricity, cable or other mechanical power, including the construction, use or repair of machinery, plant, tracks, switches, bridges, roadbeds, upon, over, and by which such railway business is operated.

"2. All work when making, using or necessitating dangerous proximity to gunpowder, blasting powder, dynamite, compressed air, or any other explosive.

"3. The erection or demolition of any bridge, building or structure in which there is, or in which the plans and specifications require, iron or steel frame work.

"4. The operation of all elevators, elevating machines or derricks or hoisting apparatus used within or on the outside of any bridge, building or other structure for conveying materials in connection with the erection or demolition of such bridge, building or structure.

"5. All work on ladders or scaffolds of any kind elevated twenty (20) feet or more above the ground or floor beneath in the erection, construction, repair, painting or alteration of any building, bridge, structure or other work in which the same are used.

"6. All work of construction, operation, alteration or repair where wires, cables, switchboards, or other apparatus or machinery are in use charged with electrical current.

"7. All work in the construction, alteration, or repair of pole lines for telegraph, telephone or other purposes.

men in the same occupations as those declared hazardous by the Employers' Liability Law (c. 14, Laws of Ariz.,

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"8. All work in or about quarries, open pits, open cuts, mines, ore reduction works and smelters.

"9. All work in the construction and repair of tunnels, sub-ways and viaducts.

"10. All work in mills, shops, works, yards, plants and factories where steam, electricity, or any other mechanical power is used to operate machinery and appliances in and about such premises.

"Sec. 5. Every employer, whether individual, firm, association, company or corporation, employing workmen in such occupation, of itself or through an agent, shall by rules, regulations, or instructions, inform all employees in such occupations as to the duties and restrictions of their employment, to the end of protecting the safety of employees in such employment.

"Sec. 6. When in the course of work in any of the employments or occupations enumerated in Sec. 4 of this Act, personal injury or death by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be liable in damages to employee injured, or, in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then to the next of kin dependent upon such employee, and if none, then to his personal representative for the benefit of the estate of the deceased.

"Sec. 7. In all actions hereafter brought against any such employer under or by virtue of any of the provisions of this Act to recover damages for personal injuries to any employee, or where such injuries have resulted in his death, the question whether the employee may have been guilty of contributory negligence, or has assumed the risk, shall be a question of fact and shall at all times be left to the jury, as provided in Sec. 5 of Article XVIII of the State Constitution.

"Sec. 8. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any employer to exempt himself or itself from any liability created by this Act, shall to that extent be void; provided, that in any action brought against any such employer under or by virtue of any of the provisions of this

Spec. Sess. 1912, p. 23). Material portions of it are in the margin.[1]

Act, such employer may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity or that [it] may have paid to the injured employee or his personal representative on account of the injury or death for which said action was brought.

"Sec. 9. In all actions for damages brought under the provisions of this Act, if the plaintiff be successful in obtaining judgment; and if the defendant appeals to a higher court; and if the plaintiff in the lower court be again successful; and the judgment of the lower court is sustained by the higher court or courts; then, and in that event the plaintiff shall have added to the amount of such judgment by such higher court or courts, interest at the rate of 12 per cent. per annum on the amount of such judgment from the date of the filing of the suit in the first instance until the full amount of such judgment is paid.

"Sec. 10. No action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

"Sec. 11. All Acts and parts of Acts in conflict herewith are hereby repealed.

"WHEREAS, the State Constitution commands the enactment of an Employers' Liability law by the Legislature at its first session; and

"WHEREAS, this Act being said Employers' Liability law is immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, and this Act shall be in full force, and effect from and after its passage and its approval by the Governor, and is hereby exempt from the operation of the Referendum provision of the State Constitution."

[1] *Workmen's Compulsory Compensation Law.*

Sec. 2. That compensation graduated according to average earnings and limited to $4,000.00, "shall be paid by his employer to any workman engaged in any employment declared and determined . . . to be especially dangerous, whether said employer be a person, firm, association, company, or corporation, if in the course of the employment of said employee personal injury thereto from any accident arising out of, and in the course of, such employment is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents, or employee or employees, to exercise due care, or to comply with any law affecting such employment."

"Sec. 4. In case such employee or his personal representative shall

In *Consolidated Arizona Smelting Co.* v. *Ujack*, (1914) 15 Arizona, 382, 384, the Supreme Court declared:—"Under the laws of Arizona, an employee who is injured in the course of his employment has open to him three avenues of redress, any one of which he may pursue according to the facts of his case. They are: (1) The common-law liability relieved of the fellow-servant defense and in which the defenses of contributory negligence and assumption of risk are questions to be left to the jury. Const., secs. 4, 5, art. 18. (2) Employers' liability law, which applies to hazardous occupations where the injury or death is not caused by his own negligence. Const., sec. 7, art. 18. (3) The compulsory compensation law, applicable to especially dangerous occupations, by which he may recover compensation without fault upon the part of the employer. Const., sec. 8, art. 18."

In *Inspiration Consolidated Copper Co.* v. *Mendez*, (July 2, 1917) 19 Arizona, 151, 154, 157, 161, the Supreme Court specifically held that the Employers' Liability Law does not conflict with the Fourteenth Amendment, and, among other things, said:—"That the liability statute must

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refuse to settle for such compensation (as provided in Sec. 8 of Article XVIII of the State Constitution) and chooses to retain the right to sue said employer (as provided in any law provided for in Sec. 7, Article XVIII of the State Constitution) he may so refuse to settle and may retain said right." "Sec. 6. The common law doctrine of no liability without fault is hereby declared and determined to be abrogated in Arizona as far as it shall be sought to be applied to the accidents hereinbefore mentioned." "Sec. 14. . . . Provided, if, after the accident, either the employer or the workman shall refuse to make or accept compensation under this Act or to proceed under or rely upon the provisions hereof for relief, then the other may pursue his remedy or make his defense under other existing statutes, the State Constitution, or the common law, except as herein provided, as his rights may at the time exist. Any suit brought by the workman for a recovery shall be held as an election to pursue such remedy exclusively."

be construed as one creating a liability for accidents resulting in injuries to the workmen engaged in hazardous occupations due to the risks and hazards inherent in such occupations, without regard to the negligence of the employer, as such negligence is understood in the common law of liability; in other words, such statute creates a liability for accident arising from the risks and hazards inherent in the occupation without regard to the negligence or fault of the employer. . . . In other words, this statute creates a liability of the master to damages suffered from any accident befalling his servant while engaged in the performance of duties in dangerous occupations without requiring the negligence of the master to be shown as an element of the right to recover; and it likewise takes away from the master his common-law right of defense of assumption of ordinary risk by the servant, and leaves to the master the right to defend upon the grounds that the servant assumed the ordinary risks other than risks inherent in the occupation." This opinion was reaffirmed in *Superior & Pittsburg Copper Co.* v. *Tomich*, (July 2, 1917) 19 Arizona, 182.

In *Arizona Copper Co.* v. *Burciaga*, (1918) 177 Pac. Rep. 29, 31, 32, 33, the Supreme Court said:—"As clearly intimated by this court in *Inspiration Consolidated Copper Co.* v. *Mendez*, 19 Arizona, 151; 166 Pac. 278, 1183, the Employers' Liability Law is designed to give a right of action to the employee injured by accident occurring from risks and hazards inherent in the occupation and without regard to the negligence on the part of the employer. Such is the clear import of the said Employers' Liability Law. . . .

"The liability incurred by the employer from a personal injury sustained by his employee from an accident arising out of and in the course of labor, service, and employment in hazardous occupations specified in the statute, and due to a condition or conditions of such occupation

or employment, if such shall not have been caused from the negligence of such employee, is such an amount as will compensate such employee for the injuries sustained by him directly attributable to such accident. . . . 'Liable in damages,' as used in paragraph 3158, c. 6, of title 14, Employers' Liability Law, Rev. Stat. of Ariz. 1913, has reference to and means that the employer becomes obligated to pay to the employee injured in an accident while engaged in an occupation declared hazardous, occurring without fault of the employer, all loss to the employee which is actually caused by the accident and the amount of which is susceptible of ascertainment. . . . Of course, mental and physical suffering experienced by the employee injured, proximately resulting from the accident, the reasonable value of working time lost by the employee, necessary expenditures for the treatment of injuries and compensation for the employee's diminished earning power directly resulting from the injury, and perhaps other results causing direct loss, are matters of actual loss and as such recoverable."

From the foregoing it appears that we have for consideration a statute which undertakes, in the absence of fault, to impose upon all employers (individual and corporate) engaged in enterprises essential to the public welfare, not subject to prohibition by the State and often not attended by any extraordinary hazard, an unlimited liability to employees for damages resulting from accidental injuries—including physical and mental pain—which may be recovered by the injured party or his administrator for benefit of widow, children, parents, next of dependent kin or the estate. The individual who hires only one man and works by his side is put on the same footing as a corporation which employs thousands; no attention is given to probable ability to pay the award; length of service is unimportant—a minute seems enough; wages contracted for bear no necessary relationship to what may be re-

covered; and a single accident which he was powerless to prevent or provide against may pauperize the employer. And by reason of existing constitutional and statutory provisions an injured workman may claim under this act or under the Compensation Law or according to the common law materially modified in his favor by exclusion of the fellow-servant rule and otherwise. On the other hand, while the employer is declared subject to new, uncertain and greatly enlarged liability, notwithstanding the utmost care, nothing has been granted him in return.

In such circumstances, would enforcement of the challenged statute deprive employers of rights protected by the Fourteenth Amendment? Plainly, I think, nothing short of an affirmative answer is compatible with well-defined constitutional guarantees.

Of course the Fourteenth Amendment was never intended to render immutable any particular rule of law nor did it by fixation immortalize prevailing doctrines concerning legal rights and liabilities. Orderly and rational progress was not forestalled. *Holden* v. *Hardy*, 169 U. S. 366, 387. But it did strip the States of all power to deprive any person of life, liberty or property by arbitrary or oppressive action—such action is never due process of law.

In the last analysis it is for us to determine what is arbitrary or oppressive upon consideration of the natural and inherent principles of practical justice which lie at the base of our traditional jurisprudence and inspirit our Constitution. A legislative declaration of reasonableness is not conclusive; no more so is popular approval—otherwise constitutional inhibitions would be futile. And plainly, I think, the individual's fundamental rights are not proper subjects for experimentation; they ought not to be sacrificed to questionable theorization.

Until now I had supposed that a man's liberty and property—with their essential incidents—were under the

protection of our charter and not subordinate to whims or caprices or fanciful ideas of those who happen for the day to constitute the legislative majority. The contrary doctrine is revolutionary and leads straight towards destruction of our well-tried and successful system of government. Perhaps another system may be better—I do not happen to think so—but it is the duty of the courts to uphold the old one unless and until superseded through orderly methods.

After great consideration in *Adair* v. *United States*, 208 U. S. 161, and *Coppage* v. *Kansas*, 236 U. S. 1, this court declared that the Fourteenth Amendment guarantees to both employer and employee the liberty of entering into contracts for service subject only to reasonable restrictions. "The principle is fundamental and vital."

In the first case an act of Congress prohibiting interstate carriers from requiring one seeking employment, as a condition of such employment, to enter into an agreement not to become or remain a member of a labor organization was declared in conflict with the Fifth Amendment. In *Coppage* v. *Kansas* a state statute which declared it unlawful to require one to agree not to be a member of a labor association as a condition of securing employment was held invalid under the Fourteenth Amendment and we said: "An interference with this liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary, unless it be supportable as a reasonable exercise of the police power of the State." In *Truax* v. *Raich*, 239 U. S. 33, 41, an Arizona statute prohibiting employment of aliens except under certain conditions was struck down. We there said: "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."

The right to employ and the right to labor are correl-

ative—neither can be destroyed nor unduly hindered without impairing the other. The restrictions imposed by the act of Congress, struck down in the *Adair Case*, by the Kansas statute, declared invalid in the *Coppage Case*, and by the Arizona statute, held inoperative in the *Truax Case*, viewed as practical matters seem rather trivial in comparison with the burden laid on employers by the statute before us. And the grounds suggested to support it really amount in substance to asserting that the legislature has power to protect society against the consequences of accidental injuries and, therefore, it may impose the loss resulting therefrom upon those wholly without fault who have afforded others welcomed opportunities to earn an honest living under unobjectionable conditions. As a measure to stifle enterprise, produce discontent, strife, idleness and pauperism the outlook for the enactment seems much too good.

In *New York Central R. R. Co.* v. *White*, and *Mountain Timber Co.* v. *Washington*, 243 U. S. 188, 219, as I had supposed for reasons definitely pointed out, we held the challenged statutes not in conflict with the Fourteenth Amendment although they imposed liability without fault and introduced a plan for compensating workmen, unknown to the common law. The elements of those statutes regarded as adequate to save their validity we specified; if such characteristics had not been found, the result, necessarily, would have been otherwise unless we were merely indulging in harmful chatter.

Here, without fault, the statute in question imposes liability in some aspects more onerous than either the New York or Washington law prescribed; and the grounds upon which we sustained those statutes are *wholly* lacking. The employer is not exempted from any liability formerly imposed; he is given no *quid pro quo* for his new burdens; the common-law rules have been set aside without a reasonably just substitute; the employee is relieved from

consequences of ordinary risks of the occupation and these are imposed upon the employer without defined limit to possible recovery which may ultimately go to non-dependents, distant relatives, or, by escheat, to the State; "the act bears no fair indication of a just settlement of a difficult problem affecting one of the most important of social relations"—on the contrary it will probably intensify the difficulties.

The liability is not restricted to the pecuniary loss of a disabled employee or those entitled to look to him for support, but includes compensation for physical and mental pain and suffering; a recovery resulting in bankruptcy to an employer may benefit only a distant relative, financially independent; the prescribed responsibility is not "to contribute reasonable amounts according to a reasonable and definite scale by way of compensation for the loss of earning power arising from accidental injuries," but is unlimited, unavoidable by any care, incapable of fairly definite estimation in advance and enforceable by litigation probably acrimonious, long drawn out and expensive. While the statute is inattentive to the employer's fault it permits recovery in excess of the employee's pecuniary misfortune; and provides for compensation, not general, but sporadic, uncertain, conjectural, delayed, indefinite as to amount and not distributed over such long period as to afford actual protection against loss or lessened earning capacity with insurance to society against pauperism, etc.

I am unable to see any rational basis for saying that the act is a proper exercise of the State's police power. It is unreasonable and oppressive upon both employer and employee; to permit its enforcement will impair fundamental rights solemnly guaranteed by our Constitution and heretofore, as I think, respected and enforced.

THE CHIEF JUSTICE, MR. JUSTICE MCKENNA and MR. JUSTICE VAN DEVANTER concur in this opinion.

HANCOCK ET AL. *v.* CITY OF MUSKOGEE, OKLAHOMA, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 360. Submitted April 30, 1919.—Decided June 9, 1919.

Due process of law does not require that the owners of property to be assessed for a local sewer improvement shall be notified in advance of the formation and bounds of the improvement district, when this is established by the legislature directly or by a municipality to which full legislative power over the subject has been delegated by the State. P. 455.

The case is different when the district is established by a board or other inferior tribunal exercising only administrative or *quasi*-judicial authority. P. 458.

When the legislature itself prescribes that the cost of such an improvement shall be apportioned against the lots in the district in proportion to area, there is no occasion for a hearing with respect to the mode in which the assessment shall be apportioned. *Id.*

How much of such cost shall be specially taxed to the property benefited, and whether the distribution shall be according to benefits to particular lots or according to frontage, values or area, are matters of legislative discretion, subject to judicial relief in cases of abuse or error in execution. P. 459.

168 Pac. Rep. 445, affirmed.

THE case is stated in the opinion.

Mr. Benjamin B. Blakeney, Mr. J. Harvey Maxey, Mr. Grant Foreman and *Mr. James D. Simms* for plaintiffs in error.

Mr. Nathan A. Gibson and *Mr. Joseph L. Hull* for defendants in error. *Mr. Thomas L. Gibson* was on the brief.

MR. JUSTICE PITNEY delivered the opinion of the court.

Plaintiffs in error, owners of real estate in the City of Muskogee, brought suit in an Oklahoma state court seeking an injunction to restrain the city and its officials from encumbering their lands with a special assessment to pay for the construction of a sewer in Sewer District No. 12 of that city; contending that the statutes of the State and the ordinances of the city under which the district was created and the cost of the sewers therein assessed against the property within the district were in violation of the Fourteenth Amendment, in that they deprived plaintiffs of their property without due process of law. The trial court refused relief, the Supreme Court of Oklahoma affirmed its judgment (168 Pac. Rep. 445), and the case comes here by writ of error.

The statutes, as they existed at the time the proceedings in question were had, are to be found in Snyder's Comp. Laws Okla. 1909, §§ 984–993. They authorize the mayor and councilmen in any municipal corporation having a population of not less than 1,000 to establish a general sewer system composed of public, district, and private sewers, and also to cause district sewers to be constructed within districts having limits prescribed by ordinance; the cost of district sewers to be apportioned against all lots and pieces of ground in the district in proportion to area, disregarding improvements and excluding the public highways.

It is contended that the statute is void because it gives no notice to property owners and makes no provision for hearing them as to the formation of the district or its boundaries, the proposed plan or method of building the sewer, or the amount to be assessed upon property in the district. While it is conceded to have been established by previous decisions of this court that, where the legislature

fixes by law the area of a sewer district or the property which is to be assessed, no advance notice to the property owner of such legislative action is necessary in order to constitute due process of law, it is insisted that in the present case the legislature has not done this, and hence it is essential to the protection of the fundamental rights of the property owner that at some stage of the proceeding he have notice and an opportunity to be heard upon the question whether his property is erroneously included in the sewer district because it cannot be benefited by the sewer, or for any other reason is improperly subjected to assessment.

But we find it to be settled by decisions of the Supreme Court of Oklahoma, which as to this are conclusive upon us, that in respect to the establishment and construction of local sewer systems and the exercise of the power of taxation in aid of this purpose, the entire legislative power of the State has been delegated to the municipalities. In *City of Perry* v. *Davis*, 18 Oklahoma, 427, referring to this same legislation the court held (p. 445): "When the legislature delegated the power to the mayor and councilmen of municipal corporations in this territory, having a *bona fide* population of not less than one thousand (1,000) persons, to establish a general sewer system, that delegation of power carried with it all the incidental powers necessary to carry its object into effect within the law. Of what utility would such a grant of power be if unaccompanied with sufficient power to carry it into effect? Under our system the power of taxation is vested exclusively in the legislative branch of the government but it is a power that may be delegated by the legislature to municipal corporations which are mere instrumentalities of the state for the better administration of public affairs. When such a corporation is created it becomes vested with the power of taxation to sustain itself with all necessary public improvements, unless the exercise of that

power be expressly prohibited. That the mayor and council of the city of Perry was authorized to establish and construct a necessary sewer system for the city, in the absence of prohibitive statutes, should not be questioned. The power to establish and construct a sewer system carried with it the power to create indebtedness and taxation for its payment." The court further held that the act constituted due process, and that the passage and publication of an ordinance establishing a sewer district constituted sufficient notice and conferred jurisdiction upon the city authorities to perform the work and provide payment therefor. This was followed in *City of Muskogee* v. *Rambo*, 40 Oklahoma, 672, 680, and also in the present case.

So far, therefore, as the present ordinance determined that a district sewer should be constructed, and established the bounds of the district for the purpose of determining what property should be subjected to the special cost of constructing it, there was an authorized exercise of the legislative power of the State, which, according to repeated decisions of this court, was not wanting in due process of law because of the mere fact that there was no previous notice to the property owners or opportunity to be heard. The question of distributing or apportioning the burden of the cost among the particular property owners is another matter. *Spencer* v. *Merchant*, 125 U. S. 345, 355-357; *Paulsen* v. *Portland*, 149 U. S. 30, 40; *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, 343; *Shumate* v. *Heman*, 181 U. S. 402, affirming *Heman* v. *Allen*, 156 Missouri, 534; *Wagner* v. *Baltimore*, 239 U. S. 207, 218; *Withnell* v. *Ruecking Construction Co.*, 249 U. S. 63.

We do not mean to say that if in fact it were made to appear that there was an arbitrary and unwarranted exercise of the legislative power, or some denial of the equal protection of the laws in the method of exercising it,

judicial relief would not be accorded to parties aggrieved. The facts of this case raise no such question. See *Wagner* v. *Baltimore*, 239 U. S. 207, 220; *Houck* v. *Little River Drainage District*, 239 U. S. 254, 265; *Myles Salt Co.* v. *Iberia Drainage District*, 239 U. S. 478, 485; *Gast Realty Co.* v. *Schneider Granite Co.*, 240 U. S. 55, 59.

The chief reliance of plaintiffs in error is upon those decisions which have held that where the legislature, instead of determining for itself what lands shall be included in a district or what lands will be benefited by the construction of a sewer, submits the question to some board or other inferior tribunal with administrative or *quasi*-judicial authority, the inquiry becomes in its nature judicial in such a sense that property owners are entitled to a hearing or an opportunity to be heard before their lands are included. *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 166-167, 174–175; *Parsons* v. *District of Columbia*, 170 U. S. 45, 52; *Embree* v. *Kansas City Road District*, 240 U. S. 242, 247. But they have no application to a case where, as in the case before us, full legislative power over the subject-matter has been conferred by the State upon a municipal corporation. Where that has been done, a legislative determination by the local legislative body is of the same effect as though made by the general legislature. *Withnell* v. *Ruecking Construction Co.*, 249 U. S. 63, 70.

It is suggested further that the statutes and ordinances in question were wanting in due process, in that they afforded the property owner no opportunity to be heard as to the distribution of the cost of the sewer among the different properties in the district or the ascertainment of the amount of the assessment to be imposed upon the lands of plaintiffs in error. Respecting this, it is sufficient to say that as the legislature itself has prescribed that the entire cost of a district sewer shall be apportioned against the lots in the district in proportion to area (excluding

the highways), there is no occasion for a hearing with respect to the mode in which the assessment shall be apportioned, since this is resolved into a mere mathematical calculation. And it is settled by the cases above cited that whether the entire amount or a part only of the cost of a local improvement shall be imposed as a special tax upon the property benefited, and whether the tax shall be distributed upon a consideration of the particular benefit to particular lots or apportioned according to their frontage upon the streets, their values, or their area, is a matter of legislative discretion, subject, of course, to judicial relief in cases of actual abuse of power or of substantial error in executing it, neither of which is here asserted.

Judgment affirmed.

AMERICAN MANUFACTURING COMPANY *v.* CITY OF ST. LOUIS.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 365. Argued April 30, 1919.—Decided June 9, 1919.

The question whether a state law or tax deprives a party of constitutional rights depends upon its practical operation and effect. P. 462.

An ordinance conditioning the right to manufacture goods within a city upon the payment of a license tax computed upon the amount of the sales of the goods so manufactured, *held*, a tax upon the business of manufacture within the city, and not a tax upon the sales. P. 463.

Such a tax when computed upon the sales of goods manufactured in the city under the license, but removed, and afterwards sold, beyond the State, does not impose a direct burden on interstate commerce or, when the manufacturer is a sister-state corporation, deprive it of property without due process. P. 464.

198 S. W. Rep. 1183, affirmed.

THE case is stated in the opinion.

Mr. S. Mayner Wallace, with whom *Mr. Shepard Barclay* was on the brief, for plaintiff in error.

Mr. Everett Paul Griffin, with whom *Mr. Charles H. Daues* was on the brief, for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

The question is whether an ordinance of the City of St. Louis levying against manufacturers, especially as against plaintiff in error, a West Virginia corporation, a tax imposed as a condition of the grant of a license to carry on a manufacturing business in that city, but the amount of which is ascertained by and proportioned to the amount of sales of the manufactured goods, whether sold within or without the State, and whether in domestic or interstate commerce, is void as amounting to a regulation of commerce among the States and thus entrenching upon the power of the national Congress under Art. I, § 8, of the Constitution, or as amounting to a taking of plaintiff's property without due process of law, in contravention of the Fourteenth Amendment.

A statute of the State (Rev. Stats. Mo. 1909, § 9857) authorizes cities to license, tax and regulate for local purposes the occupations of merchants and manufacturers and to graduate the amount of annual license imposed upon them in proportion to the sales made by such merchant or manufacturer during the year next preceding any fixed date. Pursuant to this authority the city, by the ordinance in question, in addition to an *ad valorem* property tax, requires every manufacturer in the city before doing or offering to do business as such to take out a license, and at a specified time to render a sworn statement of the aggregate amount of sales made by him during

the year next preceding the first Monday of June, and within a short time thereafter to pay a license tax of $1 on each $1,000 of sales made. Failure or refusal to deliver the required statement or to pay the license tax within the time specified is made a misdemeanor punishable by fine and the imposition of a double tax; making a false statement under oath is made punishable by forfeiture of the license in addition to a fine.

In a previous case (*Manufacturing Co.* v. *St. Louis*, 238 Missouri, 267, 278), the Supreme Court of the State held that this tax did not apply to sales made of goods shipped from plaintiff's factory in the State of New York directly to purchasers in Texas, but only to sales from its St. Louis factory.

In the present case, which was a suit brought in a state court by plaintiff in error against the city to recover so much of a disputed tax as was measured by sales of goods manufactured by plaintiff in the city, afterwards removed to storage warehouses outside of the State, and later sold from these warehouses to purchasers in States other than Missouri, the trial court at first gave judgment in favor of plaintiff on this item, and this having been reversed by the Supreme Court of the State (270 Missouri, 40), a new trial resulting in favor of the city, and the second judgment having been affirmed (198 S. W. Rep. 1183), the case comes here on writ of error.

In construing the statute and ordinance and defining the nature and effect of the tax, the Supreme Court expressed itself as follows (p. 45):

"It is not disputed that under the broad provision of its charter the city of St. Louis has the power to license and tax manufacturers within its limits; nor that the power includes the right to impose a tax upon the transaction of their business. Adopting substantially the definition we have quoted from the statute, it has, by ordinance, forbidden them to pursue their business within the city

without procuring a license, and has prescribed the additional tax they shall pay for that purpose, which is graduated to accord with the amount of business they shall carry to the point of realizing the profit or liquidating the loss by the sale of the product of their work. They may only buy and sell in pursuance of their business as manufacturers. That his right to pursue this business is the one thing he receives as compensation for this tax is evident; and that the method of fixing its amount by the amount that he realizes from the licensed activity is a just and equitable one is not disputed; nor is the inherent justice and fairness of postponing the payment until the realization of the result of the work. The tax is none the less a tax upon the business of manufacture pursued in the city of St. Louis under the protection of the laws of this State and the ordinances of the city. . . . We hold that the tax in question is a tax upon the privilege of pursuing the business of manufacturing these goods in the city of St. Louis; that when the goods were manufactured the obligation accrued to pay the amount of the tax represented by their production when it should be liquidated by their sale by the manufacturer; that their removal from the city of St. Louis and storage elsewhere, whether within or without the State, worked no change in this obligation; that their sale by the respondent wherever they may have been stored at the time, whether it was done through its home office in New York or the office of its factory in St. Louis, should have been reported in its return to the license collector of the city of St. Louis and the amount included in fixing the amount payable on account of its license tax."

As a matter of construction, this, upon familiar principles, is conclusive upon us. But, as has been held very often, the question whether a state law or a tax imposed thereunder deprives a party of rights secured by the federal Constitution depends not upon the form of the act, nor

upon how it is construed or characterized by the state court, but upon its practical operation and effect. *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, 362; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 237; *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 294.

The admitted facts show that the operation and effect of the taxing scheme now under consideration are correctly described in what we have quoted from the opinion of the state court. No tax has been or is to be imposed upon any sales of goods by plaintiff in error except goods manufactured by it in St. Louis under a license conditioned for the payment of a tax upon the amount of the sales when the goods should come to be sold. The tax is computed according to the amount of the sales of such manufactured goods, irrespective of whether they be sold within or without the State, in one kind of commerce or another; and payment of the tax is not made a condition of selling goods in interstate or in other commerce, but only of continuing the manufacture of goods in the City of St. Louis.

There is no doubt of the power of the State, or of the city acting under its authority, to impose a license tax in the nature of an excise upon the conduct of a manufacturing business in the city. Unless some particular interference with federal right be shown, the States are free to lay privilege and occupation taxes. *Clark* v. *Titusville*, 184 U. S. 329; *St. Louis* v. *United Railways Co.*, 210 U. S. 266, 276.

The city might have measured such tax by a percentage upon the value of all goods manufactured, whether they ever should come to be sold or not, and have required payment as soon as, or even before, the goods left the factory. In order to mitigate the burden, and also, perhaps, to bring merchants and manufacturers upon an equal footing in this regard, it has postponed ascertainment and payment of the tax until the manufacturer can bring

the goods into market. A somewhat similar method of postponing payment has been pursued for many years by the Federal Government with respect to the internal revenue tax upon distilled spirits. Rev. Stats., §§ 3251, 3253; Act of August 27, 1894, c. 349, § 48, 28 Stat. 509, 563.

To the suggestion that the tax burdens the mercantile rather than the manufacturing business, because it would be possible for one to manufacture goods to an unlimited extent and pay no tax unless they were sold, or to sell goods and be required to pay the tax although they were not manufactured by the seller, it is sufficient to say—answering the second point first—(a) that, according to the state law as laid down by the court of last resort in this case, a manufacturer has no right to sell goods except those of his own manufacture; and (b) it is not to be supposed that, for the purpose of evading a tax payable only upon the sale of his goods, a manufacturer would pursue the ruinous policy of making goods and locking them up permanently in warehouses. In the outcome the tax is the same in amount as if it were measured by the sale value of the goods but imposed upon the completion of their manufacture. The difference is that, for reasons of practical benefit to the taxpayer, the city has postponed payment until convenient means have been furnished through the marketing of the goods.

In our opinion, the operation and effect of the taxing ordinance are to impose a legitimate burden upon the business of carrying on the manufacture of goods in the city; it produces no direct burden on commerce in the goods manufactured, whether domestic or interstate, and only the same kind of incidental and indirect effect as that which results from the payment of property taxes or any other and general contribution to the cost of government. Therefore, it does not amount to a regulation of interstate commerce. And, for like reasons, it has not the effect of imposing a tax upon the property or the busi-

ness transactions of plaintiff in error outside of the State of Missouri, and hence does not deprive plaintiff in error of its property without due process of law.

Our recent decisions cited in opposition to this view, *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 297; *Looney* v. *Crane Co.*, 245 U. S. 178, 188, and other cases of the same kinds referred to therein, are so obviously distinguishable that particular analysis is unnecessary.

Judgment affirmed.

ERIE RAILROAD COMPANY *v.* SHUART ET AL., DOING BUSINESS UNDER THE NAME OF JOHN R. SHUART & SONS.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 342. Submitted April 25, 1919.—Decided June 9, 1919.

In a contract governing an interstate shipment of live stock the carrier's liability for negligent injury of the stock during transportation may lawfully be conditioned upon the presentation of a written claim by the shipper within five days from their removal from the cars. P. 467.

In view of the enlarged scope of "transportation," as defined by the Hepburn Act, an interstate movement of live stock is not ended when the car containing them is placed opposite a cattle chute of the carrier on a switch track at destination and left in charge of the shipper for unloading, when an adequate time for unloading them has not expired, although the shipper assumed the duty, risk and expense of their unloading by the terms of the contract for transportation. *Id. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Dettlebach*, 239 U. S. 588.

Reversed.

THE case is stated in the opinion.

Mr. Thomas Watts for petitioner.

Mr. Reeves T. Strickland for respondents. *Mr. Frank Comesky* was on the brief.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Respondents delivered to the Toledo, St. Louis & Western Railroad at East St. Louis, Illinois, a carload of horses for transportation, under a Limited Liability Livestock Contract or bill of lading via petitioner's road, to themselves at Suffern, New York, their home. Among other things the contract provided:

"That the said shipper is at his own sole risk and expense to load and take care of, and to feed and water said stock whilst being transported, whether delayed in transit or otherwise, and to unload the same; and neither said carrier nor any connecting carrier is to be under any liability or duty with reference thereto, except in the actual transportation of the same." . . . "That no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier, or sued for in any Court by the said shipper, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent, and delivered to the General Auditor of the said carrier at his office in the City of Chicago, Ill., within five days from the time said stock is removed from said car or cars, and that if any loss or damage occurs upon the line of a connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner, and delivered in like time, to some proper officer or agent of the carrier, on whose line the loss or injury occurs."

Immediately after the car arrived at Suffern, petitioner placed it on a switch track opposite a cattle chute and left it in charge of respondents for unloading. By letting

down a bridge they at once connected the chute and car and were about to lead out four horses when an engine pushed other cars against it and injured the animals therein. No written claim was made for the loss or damage as provided by the bill of lading; and when sued the carrier defended upon that ground. Respondents maintain that transportation had ended when the accident occurred and consequently no written claim was necessary. The courts below accepted this view.

Under our former opinions, the clause requiring presentation of a written claim is clearly valid and controlling as to any liability arising from beginning to end of the transportation contracted for. *Chesapeake & Ohio Ry. Co.* v. *McLaughlin*, 242 U. S. 142; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Starbird*, 243 U. S. 592; *Baltimore & Ohio R. R. Co.* v. *Leach*, 249 U. S. 217; *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Dettlebach*, 239 U. S. 588, 593, 594; and *Southern Ry. Co.* v. *Prescott*, 240 U. S. 632.

In *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Dettlebach* we pointed out that the Hepburn Act enlarged the definition of "transportation" so as to include "cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration, or icing, storage, and hauling of property transported"; and we said from this and other provisions of the act "it is evident that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that so far as inter-

state carriers by rail were concerned the entire body of such services should be included together under the single term 'transportation' and subjected to the provisions of the Act respecting reasonable rates and the like."

In the instant case, when injured, the animals were awaiting removal from the car through a cattle chute alleged to be owned, operated and controlled by the railroad. If its employees had then been doing the work of unloading there could be no doubt that transportation was still in progress; and we think that giving active charge of the removal to respondents, as agreed, was not enough to end the interstate movement. The animals were in the car; no adequate time for unloading had transpired. The carrier had not fully performed the services incident to final delivery imposed by law. These included the furnishing of fair opportunity and proper facilities for safe unloading although the shippers had contracted to do the work of actual removal. See Hutchinson on Carriers, §§ 711, 714, 715.

Petitioner's request for an instructed verdict in its behalf should have been granted. The judgment below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE CLARKE dissenting.

I greatly regret that I cannot concur in the opinion and judgment of the court in this case, but I cannot consent to share in what seems to me a very strained construction of a definition in the Hepburn Act (34 Stat. 584, c. 3591, § 1) which will result in keeping alive a bill of lading, with the effect of excusing the carrier from liability for negligently damaging the live stock of a consignee, after it had been delivered, on the ground that a claim in writing for the damage, duly verified, had not been presented within five days.

465. CLARKE, J., dissenting.

My reasons for dissenting, stated as briefly as may be, are as follows:

It is shown by the opinion of the court that the consignee, a partnership of three members, was bound by the bill of lading to unload the horses at destination.

The consignee, being notified by the carrier as to the probable time of the arrival of the car, on the day before it arrived, paid what was supposed to be the full amount of the freight charges, and two members of the partnership were at the station at three o'clock in the morning to receive and unload it.

When the train came, the senior member of the consignee stood in the cattle chute with the conductor, while the latter was placing the car for unloading and approved as satisfactory the position in which it was placed. Thereupon, a brakeman set the brake, the engine was cut off and the conductor went away and left the car in the sole custody of the consignee, after saying to its representative, "You had better get them out as soon as you can, they have been on the road a good while and must be tired and hungry." Two members of the partnership, consignee, went to work at once to unload the horses, but it was necessary to get some boards to make the bridge from the car to the chute safe, and in about half an hour, when the two were in the act of leading two horses from the car, other cars were negligently thrown against it and caused the damage sued for.

I dissent from the opinion of the court because I agree with the three New York courts that the undisputed facts thus stated show that the transportation was ended and the delivery of the stock was so completely made as to end all liability of the carrier under the bill of lading, before the negligence of the company occurred which caused the damage complained of.

What constitutes delivery of goods or of live stock by a carrier is usually a mixed question of law and fact, but

where, as here, the facts are not disputed, it is a question of law.

What more was there for the carrier to do,—what more could it have done—to make more complete the delivery necessary to fulfill its obligation as a carrier? The journey was ended, the freight charges were paid, and the car was placed on a side track in an appropriate place and position for unloading, which was approved by the consignee. It had been accepted by two members of the partnership, consignee, and had passed into their exclusive custody a full half hour before the accident. No assistance was asked for or needed after the conductor delivered the car and went away and thereafter the carrier owed to the consignee only the duty which it owed to any property lawfully upon or near to its tracks,—not to negligently or wilfully injure it, and it was for violation of that duty, not for failure to discharge duties imposed by the bill of lading, that this suit was instituted. The case is one of side track delivery, the equivalent of the familiar delivery of a car to an "industrial track" or "team unloading track" of a railroad, with possession taken by the consignee before the damage was done.

To the weighty authority of the New York courts which decided in this case that the delivery was complete before the damage was done, may be added, a few from many, the decisions of the Supreme Courts: of Michigan, in a strikingly similar case but with not so complete a delivery, in *Brown* v. *Pontiac, Oxford & Northern R. R. Co.*, 133 Michigan, 371; of Illinois, in *Gratiot Street Warehouse Co.* v. *St. Louis, Alton & Terre Haute R. R. Co.*, 221 Illinois, 418; of North Carolina, in *Reid* v. *Southern Ry. Co.*, 149 N. Car. 423; of Georgia, in *Kenny Co.* v. *Atlanta & West Point R. R. Co.*, 122 Georgia, 365. And see *Hedges* v. *Hudson River R. R. Co.*, 49 N. Y. 223.

The definition of "transportation" in the Hepburn Act (34 Stat. 584), relied upon in the court's opinion, seems

to me quite irrelevant. That provision was incorporated into the act to prevent unjust discrimination by carriers in terminal delivery charges, as the context and the history of the act abundantly show. It defined "transportation" but did not define what should constitute delivery to a consignee,—that was left untouched and is governed by the prior decisions of courts and by those which have been developed since.

Equally beside the question involved seems to me the decision in *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Dettlebach*, 239 U. S. 588, 593, 594, cited in the opinion of the court. The question there under consideration was, whether when goods carried to destination were lost, after they had been held more than a month uncalled for, the liability of the carrier was to be determined by the terms of the bill of lading or by the more limited liability of a warehouseman. Obviously there was no question in the case as to what constituted delivery, for there was no pretense of delivery, actual or constructive, and therefore the decision cannot be of service in determining this case.

The opinion of the court in this case concludes:

"The animals were in the car; no adequate time for unloading had transpired. The carrier had not fully performed the services incident to final delivery imposed by law. These included the furnishing of fair opportunity and proper facilities for safe unloading although the shippers had contracted to do the work of actual removal. See Hutchinson on Carriers, §§ 711, 714, 715."

I cannot find justification, in the sections cited, for such a statement of the law as is here made.

Section 711 deals with the obligation to unload carload freight, and, after saying that it is "the uniform rule and custom in this country" for the consignee to unload, the only other relevant statement of the writer is:

"All, therefore, that can be required of the railroad

company is that it shall place the cars where they may be safely and conveniently unloaded."

This the carrier in the case before us had done to the satisfaction and acceptance of the consignee before the accident complained of.

Section 714 deals with the liability of the carrier pending removal (delivery) of the goods, and says:

"During this reasonable time [for delivery] the liability of the carrier remains unchanged; but so soon as it has elapsed he no longer stands in the relation of carrier to the goods, but in that of an ordinary bailee for hire."

The "reasonable time" here referred to is palpably that necessary for the carrier to wait before its obligation becomes that of a warehouseman when the consignee does not appear to claim the shipment,—it is not applicable to the time for unloading after the property has been accepted by the consignee.

Section 715 declares that:

"If the consignee is bound to unload the goods himself from the car, it is the duty of the carrier to place the car where it can be unloaded with a reasonable degree of convenience, and to furnish the consignee with safe and proper facilities for the purpose."

All of this the carrier in this case did, and the consignee not only approved as satisfactory, safe and proper, the position in which the car was placed and the facilities furnished for unloading it, but the delivery of the car was accepted and was in the actual possession and custody of the consignee for a very considerable time before the accident complained of happened. It was not in any attempt or effort on the part of the carrier to improve the unloading facilities or to assist the consignee that the damage was done, but it was the result of a tort, pure and simple,—of a negligent switching operation, entirely independent of the delivery of the shipment, occurring a half hour after it had been accepted.

The delivery having been completed and accepted by the consignee, the five-day limitation, so unreasonable in itself that it has been prohibited by congressional enactment (38 Stat. 1196, c. 176, § 1) has, in my judgment, no applicability to this case, and to bottom the conclusion announced upon the definition of "transportation" in the Hepburn Act is to convert what was intended for the protection of shippers of property in interstate commerce into an instrument of injury and injustice.

For the reasons thus stated I dissent from the opinion and judgment of the court.

MR. JUSTICE MCKENNA and MR. JUSTICE BRANDEIS concur in this dissent. MR. JUSTICE DAY also dissents.

BARRETT v. VIRGINIAN RAILWAY COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 275. Submitted March 21, 1919.—Decided June 9, 1919.

The right to take a voluntary nonsuit is substantial, and when and how it may be asserted are questions relating directly to practice and mode of proceeding within the intendment of the Conformity Act. P. 476.

Under the law of Virginia, in the absence of a demurrer to the evidence and joinder therein, the plaintiff may take a nonsuit at any time before the retirement of the jury. P. 477.

A motion by defendant for a directed verdict at the conclusion of the testimony, when made in a federal court in Virginia, is not equivalent to a demurrer to the evidence, and the making of such a motion and its impending allowance do not place the plaintiff's right to take a nonsuit at the sound discretion of the court. *Id.*

244 Fed. Rep. 397, reversed.

THE case is stated in the opinion.

Mr. W. L. Welborn for petitioner. *Mr. John C. Jamison* and *Mr. John G. Challice* were on the brief.

Mr. G. A. Wingfield and *Mr. H. T. Hall* for respondent. *Mr. W. H. T. Loyall* was on the brief.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Claiming under the Federal Employers' Liability Act, (April 22, 1908, c. 149, 35 Stat. 65) petitioner sued the Virginian Railway Company in the United States District Court, Western District of Virginia, for damages on account of personal injuries suffered by him July 27, 1915.

At conclusion of the testimony the railway company moved for a directed verdict; after consideration the trial judge read to counsel an opinion giving reasons and announced his purpose to grant the motion. "And thereupon the plaintiff, by counsel, moved the court to be permitted to take a voluntary nonsuit; which motion was opposed by counsel for defendant. And as the court is of opinion that the motion comes too late, it is overruled; and to this action of the court the plaintiff, by counsel, excepted. And thereupon the court directed the jury to find a verdict for the defendant; and to this action of the court the plaintiff, by counsel, excepted. And thereupon the jury rendered and returned the following verdict: 'We, the jury, by direction of the court, find for the defendant.'" Judgment thereon was affirmed by the Circuit Court of Appeals, 244 Fed. Rep. 397. Petitioner there urged that the trial court erred (1) in directing a verdict for the defendant, and (2) in denying the plaintiff's request to take a voluntary nonsuit. Both claims were denied and are renewed here.

We think refusal to permit the requested nonsuit was error and for that reason the judgment below must be reversed. This makes it unnecessary to consider the other point.

The Act of June 1, 1872,—The Conformity Act—(Rev. Stats., § 914; c. 255, § 5, 17 Stat. 197) provides: "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

Construing the statute in *Nudd* v. *Burrows* (1875), 91 U. S. 426, 441, 442, this court said: "The purpose of the provision is apparent upon its face. No analysis is necessary to reach it. It was to bring about uniformity in the law of procedure in the Federal and State courts of the same locality. It had its origin in the code-enactments of many of the States. While in the Federal tribunals the common-law pleadings, forms, and practice were adhered to, in the State courts of the same district the simpler forms of the local code prevailed. This involved the necessity on the part of the bar of studying two distinct systems of remedial law, and of practicing according to the wholly dissimilar requirements of both. The inconvenience of such a state of things is obvious. The evil was a serious one. It was the aim of the provision in question to remove it. This was done by bringing about the conformity in the courts of the United States which it prescribes. The remedy was complete. The personal administration by the judge of his duties while sitting upon the bench was not complained of. . . . The personal conduct and administration of the judge in the discharge of his separate functions, is, in our judgment,

neither *practice, pleading,* nor *a form* nor *mode of proceeding* within the meaning of those terms as found in the context." See also *Indianapolis & St. Louis R. R. Co.* v. *Horst,* 93 U. S. 291, 300.

"It is now a settled rule in the courts of the United States that whenever, in the trial of a civil case, it is clear that the state of the evidence is such as not to warrant a verdict for a party, and that if such a verdict were rendered the other party would be entitled to a new trial, it is the right and duty of the judge to direct the jury to find according to the views of the court. Such is the constant practice, and it is a convenient one. It saves time and expense. It gives scientific certainty to the law in its application to the facts and promotes the ends of justice." *Bowditch* v. *Boston,* 101 U. S. 16, 18; *Pleasants* v. *Fant,* 22 Wall. 116, 122; *Oscanyan* v. *Arms Company,* 103 U. S. 261, 265; *Randall* v. *Baltimore & Ohio R. R. Co.,* 109 U. S. 478, 482; *District of Columbia* v. *Moulton,* 182 U. S. 576, 582; *Hepner* v. *United States,* 213 U. S. 103, 113. And this rule is not subject to modification by state statutes or constitutions. *Indianapolis & St. Louis R. R. Co.* v. *Horst, supra; St. Louis, Iron Mountain & Southern Ry.* v. *Vickers,* 122 U. S. 360, 363; *Lincoln* v. *Power,* 151 U. S. 436, 442.

At the common law, as generally understood and applied, a nonsuit could be taken freely at any time before verdict if not indeed before judgment. *Confiscation Cases,* 7 Wall. 454, 457; *Derick* v. *Taylor,* 171 Massachusetts, 444, 445; Bac. Abr. Nonsuit (D). And see *Pleasants* v. *Fant, supra,* 122. The right is substantial. When and how it may be asserted we think are questions relating directly to practice and mode of proceeding within intendment of the Conformity Act.

Section 3387, Virginia Code (1904), provides: "A party shall not be allowed to suffer a non-suit, unless he do so before the jury retire from the bar." Prior to this provision, a plaintiff there had the absolute right to take a

voluntary nonsuit at any time before verdict. *Harrison* v. *Clemens*, 112 Virginia, 371, 373. Chapter 27, Va. Acts, 1912, directs "That in no action tried before a jury shall the trial judge give to the jury a peremptory instruction directing what verdict the jury shall render." And c. 42, *Idem*, provides: "In all suits or motions hereafter, when the evidence is concluded before the court and jury, the party tendering the demurrer to evidence shall state in writing specifically the grounds of demurrer relied on, and the demurree shall not be forced to join in the said demurrer until the specific grounds upon which the demurrant relies are stated in writing; nor shall any grounds of demurrer not thus specifically stated be considered, except that the court may, in its discretion, allow the demurrant to withdraw the demurrer; may allow the joinder in demurrer to be withdrawn by the demurree, and new evidence admitted, or a non-suit to be taken until the jury retire from the bar."

Citing *Parks* v. *Ross*, 11 How. 362, 373, and *Richardson* v. *Boston*, 19 How. 263, (see also *Schuchardt* v. *Allens*, 1 Wall. 359, 370), petitioner maintains that in the federal courts the practice of directing verdicts has superseded the demurrer to evidence and should be controlled by the same general principles. Therefore, it is said, the statutory rule which gives the judge discretion to allow or refuse a nonsuit after joinder in such a demurrer applies when there is a motion for directed verdict.

Obviously the laws of Virginia recognize a marked distinction between demurrer to evidence and direction of a verdict—the former is permitted, the latter is expressly prohibited. And the different nature and effect of the two things has been pointed out in *Oscanyan* v. *Arms Company*, *supra*, 264; *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 39; and *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364, 388. The conclusion announced in *Parks* v. *Southern Ry. Co.*, 143

Fed. Rep. 276, 277, that because federal courts may in proper cases direct verdicts, therefore, in the exercise of sound discretion they may deny an application for leave to take a nonsuit and direct verdict for defendant is not well founded.

Under the Virginia statute, in the absence of a demurrer to the evidence and joinder therein, the plaintiff may take a nonsuit at any time before submission of the case to the jury and their retirement. The Conformity Statute gives the same right in federal courts. This conclusion accords with opinions by the Circuit Courts of Appeals for the Sixth, Seventh and Eighth Circuits. *Knight* v. *Illinois Central R. R. Co.*, 180 Fed. Rep. 368; *Meyer* v. *National Biscuit Co.*, 168 Fed. Rep. 906; *Chicago, M. & St. P. Ry. Co.* v. *Metalstaff*, 101 Fed. Rep. 769.

The judgment below must be reversed and the cause remanded to the District Court with direction to set aside the judgment in favor of respondent and sustain motion to enter a nonsuit. *Knight* v. *Illinois Central R. R. Co.*, *supra*, 374; *Harrison* v. *Clemens*, *supra*, 374, 375.

Reversed.

TEXAS & PACIFIC RAILWAY COMPANY ET AL. *v.* LEATHERWOOD.

CERTIORARI TO THE COURT OF CIVIL APPEALS, SECOND SUPREME JUDICIAL DISTRICT, OF THE STATE OF TEXAS.

No. 249. Submitted March 19, 1919.—Decided June 9, 1919.

Under the Carmack Amendment, connecting carriers, by requiring a shipper to sign new bills of lading for a shipment billed over their lines by the initial carrier, are not estopped to avail themselves of a provision of the original bill limiting the time for bringing actions

for damages, (p. 481), where the new bills were not acquiesced in by the shipper. P. 483.

A stipulation in a bill of lading limiting to six months the time within which the shipper may sue for damages is not unreasonable and, before the Act of March 4, 1915, c. 176, 38 Stat. 1196, was valid under the Carmack Amendment. P. 481.

Where matter clearly not required for a proper presentation of the questions submitted is incorporated into the transcript, the court may, under Rule 8, § 1, require that the whole of the clerk's fees for supervising the printing and the cost of printing the record be borne by the offending party. P. 482.

Reversed.

THE case is stated in the opinion.

Mr. George Thompson and *Mr. J. H. Barwise, Jr.*, for petitioners.

Mr. D. T. Bomar for respondent. *Mr. J. E. Garland* was on the brief.

MR. JUSTICE BRANDEIS announced the judgment of the court, and delivered the following opinion:

Leatherwood made, in 1913, a shipment of horses from Watrous, New Mexico, to Waco, Texas, over four connecting railroads. The initial carrier gave him a through bill of lading which contained a provision barring any action for damages unless suit was brought within six months after the loss occurred. When the horses reached the lines of the Texas & Pacific Railway and of the Missouri, Kansas & Texas Railway, each of these companies insisted, as a condition of carrying them further, that Leatherwood accept and sign a new bill of lading covering the shipment over its line, and he did so.

In 1915 he brought suit in a state court of Texas for injury to the horses while in transit on the lines of those two companies. The bills of lading issued by them did

not contain the provision requiring suit to be brought within six months; but the carriers set up as a defense the provisions to that effect contained in the original bill of lading, contending that under the Carmack Amendment (Act of June 29, 1906, c. 3591, 34 Stat. 584, 595) all connecting carriers were bound by its terms and that the later ones issued by themselves were of no legal effect.[1] The trial court denied this contention, and ruled as matter of law that the carriers could not rely upon the provision in the initial bill of lading. Judgment was entered for the plaintiff and affirmed by the Court of Civil Appeals. On June 2, 1917, that court denied a rehearing and declined to certify to the Supreme Court of Texas the questions involved. The case comes here on writ of certiorari (245 U. S. 649) under § 237 of the Judicial Code, as amended by Act of September 6, 1916, c. 448, 39 Stat. 726.

The final decision below was rendered two days before the decision of this court in *Missouri, Kansas & Texas Ry. Co.* v. *Ward*, 244 U. S. 383. There one of the same railroads had, as connecting carrier, issued a second bill of lading to shippers of live stock who had received from the initial carriers a through bill of lading on an interstate shipment. But there the carriers relied for defense upon a clause in the second bill of lading, which was not contained in the first. We held that the second bill of lading was void, since under the Carmack Amendment the several carriers must be treated, not as independent contracting parties, but as one system; and that the connecting lines become in effect mere agents whose duty it is to forward the goods under the terms of the contract made by their principal, the initial carrier, and that they are prevented

[1] The rights of the parties are not affected by the Act of March 4, 1915, c. 176, 38 Stat. 1196, which prohibits a common carrier from providing by contract or otherwise for a shorter period than two years for the institution of suits.

by law from varying the terms of that contract. Leatherwood contends that the principle upon which the case was decided is not applicable here, because there the carriers sought to avail themselves of the second bill of lading, while here they seek to ignore it; and he insists that the carriers are, by their conduct, estopped from asserting its invalidity. As stated in *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 197, the parties to a bill of lading cannot waive its terms, nor can the carrier by its conduct give the shipper a right to ignore them. "A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed." The bill of lading given by the initial carrier embodies the contract for transportation from point of origin to destination; and its terms in respect to conditions of liability are binding upon the shipper and upon all connecting carriers, just as a rate properly filed by the initial carrier is binding upon them. Each has in effect the force of a statute, of which all affected must take notice. That a carrier cannot be prevented by estoppel or otherwise from taking advantage of the lawful rate properly filed under the Interstate Commerce Act is well settled. A carrier has, for instance, been permitted to collect the legal rate, although it had quoted a lower rate and the shipper was ignorant of the fact that it was not the legal rate. *Texas & Pacific Ry. Co.* v. *Mugg*, 202 U. S. 242; *Illinois Central R. R. Co.* v. *Henderson Elevator Co.*, 226 U. S. 441; *Louisville & Nashville R. R. Co.* v. *Maxwell*, 237 U. S. 94; *Missouri, Kansas & Texas Ry. Co. of Texas* v. *Schnoutz*, 245 U. S. 641 (*Per curiam*).

The provision in the original bill of lading limiting to six months the time within which suit may be brought, not being unreasonable (*Missouri, Kansas & Texas Ry. Co.* v. *Harriman*, 227 U. S. 657, 672–673), was valid; and as the original bill of lading remained binding, the lower

courts erred in denying it effect. The judgment of the Court of Civil Appeals must therefore be reversed.

The record occupies 213 printed pages. Most of the matter which was included in it at the instance of petitioners was clearly not required for a proper presentation of the questions submitted here. Much useless expense has been incurred; and both court and counsel have been subjected to the burden of examining much that is irrelevant. Section 1 of Rule 8 of this court specifically provides that if portions of the record unnecessary to a proper presentation of the case are found to have been incorporated into the transcript by either party, the court may order that the whole or any part of the clerk's fees for supervising the printing and the cost of printing the record be paid by the offending party. Under the circumstances of this case it seems appropriate that the whole of this expense be borne by the petitioners; and it is so ordered.

Judgment reversed.

I am authorized to say that THE CHIEF JUSTICE, MR. JUSTICE HOLMES, and MR. JUSTICE DAY concur in the above opinion.

MR. JUSTICE MCKENNA, MR. JUSTICE PITNEY, and MR. JUSTICE CLARKE dissent.

MR. JUSTICE MCREYNOLDS concurring.

I concur in the conclusion that the judgment below must be reversed. Circumstances disclosed by the record and not discussed in the opinion, I think, require this result. But the broad declaration that the parties to a bill of lading cannot waive its terms nor can the carrier, by its conduct, give the shipper the right to ignore them goes beyond what is necessary to the decision and I am not prepared to assent to it as a proposition of law.

478. Syllabus.

Suit was originally brought against the initial line (The Santa Fe) and connecting ones—Texas & Pacific Ry. Co. and Missouri, Kansas & Texas Railway—the claim being based upon the implied obligation arising out of delivery and acceptance of the horses by the former for through interstate carriage. In his pleadings the shipper expressly denied validity of all bills of lading—one issued by the Santa Fe and one by each of the petitioners. Of course, under the rule approved in *Missouri, Kansas & Texas Ry. Co.* v. *Ward*, 244 U. S. 383, he could have relied upon the first bill; but it does not follow that if, during transit, a connecting carrier declined to recognize the original agreement for through transportation and refused to proceed thereunder, he had no power to acquiesce, take possession of the animals and re-ship under another contract with such carrier not subject to avoidance by it. And if, in the present cause, instead of repudiating the bills of lading issued by connecting roads he had relied upon them the question presented would be a very different one, decision of which is not now demanded.

MR. JUSTICE VAN DEVANTER joins in this opinion.

SOUTHERN PACIFIC COMPANY *v.* BOGERT ET AL., EXECUTORS OF LAWRENCE, ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 305. Argued April 17, 21, 1919.—Decided June 9, 1919.

To constitute laches it is essential that there be acquiescence in the alleged wrong or lack of diligence in seeking a remedy, in addition to lapse of time. P. 488.

So *held* where there was a delay of over 22 years upon the part of minority shareholders in seeking to affix a trust on shares in a new corporation held by the majority, but in the interval the plaintiffs, or others representing the minority as a class, had been diligent in attacking the foreclosure and reorganization proceedings through which such shares were acquired.

When the cause of action is such that suit may be brought on behalf of the plaintiff and all persons similarly situated, it is not essential that each such person should intervene in order to avoid the charge of having slept on his rights. P. 489.

Long failure to discover the appropriate remedy, though well known, does not establish laches if there has been due diligence and the delay has not prejudiced the defendant. P. 490.

Judgments against minority shareholders in suits to set aside a foreclosure and a reorganization agreement as fraudulent, and to compel a reduction of the assessment under the agreement and enjoin distribution of stock according to its terms, *held*, not to estop them, by way either of *res judicata* or of election, from maintaining a further suit to declare the majority shareholder their trustee of new shares taken by it under the reorganization. *Id.*

The fact that the majority shareholder, as part of an unfair scheme of reorganization brought about through its control, guarantees the bonds of a new company, successor to the corporate property, and agrees to take the shares of the new company not taken by the minority, does not give it the status of a banker or underwriter, in relation to the minority shareholders, and thus relieve it of its fiduciary duty to them in respect of the new shares so acquired, when its design was to secure the property for its own purposes and nothing has been paid under the guaranty. P. 491.

The doctrine under which majority shareholders exercising control are deemed trustees for the minority applies where the control is exercised by a corporation through a subsidiary over a third corporation of which the subsidiary is the majority shareholder. *Id.*

The duty of the majority shareholder to make *pro rata* distribution of the fruits of its control on equal terms among the minority is fiduciary, and not dependent on fraud or mismanagement. P. 492.

In a suit by the minority to hold the majority shareholder as trustee of shares in a new company acquired by the defendant through

a reorganization, the old company is not a necessary party. P. 492.

In such a suit, the fact that the floating debts of the old company were not provided for in the reorganization does not bar relief to the minority, they not having been at fault. *Id.*

Where the majority shareholder of a corporation, through a reorganization obtained all the shares of a new corporation, successor to the old, and, after years, during which the minority attacked only the reorganization proceedings, pledged them with other securities as collateral, *held*, that the minority's later claim to such shares *in specie* should be so enforced as not to create undue pecuniary burdens on the majority in maintaining the collateral values under the loan agreement, and, to this end, that depreciation of the other collateral since the entry of the present decree should be taken into consideration, upon remand of the case for other reasons. P. 493.

In such a suit, the majority shareholder should be allowed appropriate compensation for its contributions toward satisfaction of the floating debts of the old company, in so far as the new shares to be received by the minority shareholders of that company are thereby increased in value. P. 494.

Held, that the claim of such compensation was not too late in this case, it having been made before final decree and it not appearing that the delay in asserting it was prejudicial to plaintiffs. P. 496.

Such contributions may consist in payments by the majority shareholder directly, or in effect by it through its subsidiary corporation. P. 495.

In determining the amounts of such contributions and the extent to which they benefited such minority shareholders, judgments on floating debts against the old company *held* not to bar consideration of other relevant facts. *Id.*

In a class suit by minority shareholders, others in like case may be allowed to intervene in the District Court after interlocutory decree. *Id.*

In a suit of that character, application of minority shareholders to intervene in this court *denied*, without prejudice to their right to apply to the District Court, the case being remanded. P. 498.

Decree modified. For the opinion below see 244 Fed. Rep. 61.

THE case is stated in the opinion.

Mr. Lewis H. Freedman and *Mr. Gordon M. Buck*, with whom *Mr. Arthur H. Van Brunt* was on the briefs, for petitioner.

Mr. Charles E. Hughes, with whom *Mr. H. Snowden Marshall*, *Mr. David Gerber* and *Mr. Dudley F. Phelps* were on the brief, for respondents.

Henry J. Chase, *Fergus Reid*, *Albert M. Polack*, *Francis P. O'Reilly* and *The Corn Exchange Bank* filed petitions for leave to intervene, etc.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

In 1888, and for some years prior thereto, the Southern Pacific Company dominated the Houston & Texas Central *Railway* Company, electing directors and officers through one of its subsidiaries, which owned a majority of the Houston Company stock. In 1888, pursuant to a reorganization agreement, mortgages upon the Houston Company properties were foreclosed and these were acquired by the Houston & Texas Central *Railroad* Company; the old company's outstanding bonds were exchanged for bonds of the new; all the new company's stock was delivered to the Southern Pacific; its lines of railroad were incorporated in the transcontinental system of that corporation; and the minority stockholders of the old Houston Company received nothing. In 1913, the appellees, suing on behalf of themselves and other minority stockholders, brought this suit in the Supreme Court of New York to have the Southern Pacific declared trustee for them of stock in the new Houston Company and for an accounting. The plaintiffs below being citizens and residents of New York, and the Southern Pacific, a Kentucky corporation, it removed the case to the District Court of the United States for the

Eastern District of New York; and that court, after a hearing on the evidence, entered a decree for the plaintiffs. (226 Fed. Rep. 500. See also 215 Fed. Rep. 218, and 211 Fed. Rep. 776.) There had been issued by the old Houston Company 77,269 shares of stock, and by the new 100,000 shares. The decree declared that the Southern Pacific held for plaintiffs and other stockholders who intervened 24,347 9-10 shares in the new Houston Company, directed that it should deliver to them these shares and also in cash the sum of $702,336.61 (being the aggregate of all dividends paid thereon) and interest thereon from the times the several dividends were received, upon receiving from them 18,816 shares in the old Houston Company and also with each share of old stock delivered $26 [1] in cash and interest thereon from February 10, 1891. This decree was affirmed by the Circuit Court of Appeals (244 Fed. Rep. 61); and the case comes here on certiorari (245 U. S. 668).

In considering the many objections urged against the decree, it is important to bear constantly in mind the exact nature of the equity invoked by the bill and recognized by the lower courts. The minority stockholders do not complain of a wrong done the corporation or of any wrong done by it to them. They complain of the wrong done them directly by the Southern Pacific and by it alone. The wrong consists in its failure to share with them, the minority, the proceeds of the common property of which it, through majority stockholdings, had rightfully taken control. In other words, the minority assert the right to a pro rata share of the common property; and equity enforces the right by declaring the trust on which the Southern Pacific holds it and ordering distribution or compensation. The rule of corporation law and of equity invoked is well settled and has been often applied. The majority has the right to control; but when it does so, it

[1] The exact figure is $26.026.

occupies a fiduciary relation toward the minority, as much so as the corporation itself or its officers and directors. If through that control a sale of the corporate property is made and the property acquired by the majority, the minority may not be excluded from a fair participation in the fruits of the sale.[1]

The facts on which the decree is based are carefully set forth in the bill of complaint; and the decree declares in terms that every allegation contained in it is true. No adequate reason is shown for challenging, in any respect material for the purposes of this opinion, the correctness of this concurrent finding of the two lower courts; and it is accepted as correct. *Baker* v. *Schofield*, 243 U. S. 114, 118. The detailed facts and the evidence upon which they rest are fully recited in the opinions delivered below or in the earlier litigation hereafter referred to; and the facts will be recited here only so far as necessary to an understanding of the several errors of law now insisted upon.

First. The Southern Pacific contends that plaintiffs are barred by laches. The reorganization agreement is dated December 20, 1887; the decree of foreclosure and sale was entered May 4, 1888; the sale was held September 8, 1888; and the stock in the new company was delivered to the Southern Pacific on February 10, 1891. This suit was not begun until July 26, 1913; and not until that time was there a proper attempt to assert the specific equity here enforced; namely, that the Southern Pacific received the stock in the new Houston Company as trustee for the stockholders of the old. More than twenty-two years had thus elapsed since the wrong complained of was committed. But the essence of laches is not merely lapse of time. It is essential that there be also acquiescence in the

[1] *Menier* v. *Hooper's Telegraph Works*, L. R. 9 Ch. App. 350, 354; *Ervin* v. *Oregon Ry. & Nav. Co.*, 20 Fed. Rep. 577; 27 Fed. Rep. 625; *Farmers' Loan & Trust Co.* v. *New York & Northern Ry. Co.*, 150 N. Y. 410; *Sparrow* v. *E. Bement & Sons*, 142 Michigan, 441.

alleged wrong or lack of diligence in seeking a remedy. Here plaintiffs, or others representing them, protested as soon as the terms of the reorganization agreement were announced; and ever since, they have with rare pertinacity and undaunted by failure persisted in the diligent pursuit of a remedy as the schedule of the earlier litigation referred to in the margin demonstrates.[1] Where the cause of action is of such a nature that a suit to enforce it would be brought on behalf not only of the plaintiff but of

[1] The earlier litigation is summarized thus in the opinion of the District Court: "*Carey* v. *H. & T. C. Ry. Co.*, 45 Fed. Rep. 438 (1891); *Id.* (C. C.) 52 Fed. Rep. 671 (1892); stockholders held not entitled to decree enjoining carrying out of plan of reorganization, or to have foreclosure set aside as fraudulent. *Carey* v. *H. & T. C. Ry. Co.*, 150 U. S. 170 (1893); appeal to Supreme Court from decree of Circuit Court dismissed. *Carey* v. *H. & T. C. Ry. Co.*, 9 C. C. A. 687, 13 U. S. App. 729 (1894); decree of Circuit Court affirmed by Circuit Court of Appeals for the Fifth Circuit. *Carey* v. *H. & T. C. Ry. Co.*, 161 U. S. 115 (1896); appeal to Supreme Court from decree of Circuit Court of Appeals dismissed. *Gernsheim* v. *Olcott*, 7 N. Y. Supp. 872 (1889); 10 N. Y. Supp. 438 (1890); *Gernsheim* v. *Central Trust Co.*, 61 Hun, 625; 16 N. Y. Supp. 127 (1891); stockholders held not entitled to reduction of assessment or to injunction against distribution of stock of new company under reorganization. *MacArdell* v. *Olcott*, 104 App. Div. 263 (1905); *Id.* 189 N. Y. 368 (1907); action by stockholders to set aside foreclosure sale and annul reorganization agreement on ground of fraud dismissed. *MacArdell* v. *Olcott*, 62 App. Div. 127 (1901); application of stockholder for leave to intervene denied for laches. *Lawrence* v. *Southern Pacific Co.* (C. C.), 165 Fed. Rep. 241 (1908); *Id.* (C. C.) 177 Fed. Rep. 547 (1910); *Id.* (C. C.) 180 Fed. Rep. 822 (1910); action by stockholder for accounting and other relief; motions to remand denied and suit dismissed. *Bogart* v. *Southern Pacific Co.*, 228 U. S. 137 (1913); appeal to Supreme Court from decree of Circuit Court in *Lawrence* v. *Southern Pacific Co.*, *supra*, dismissed. *MacArdell* v. *Olcott*, (N. Y. Court of Appeals, October 29, 1907) 189 N. Y. 369, affirming 104 App. Div. 263, with statement of limitations in the complaint. In the last-named case, the court (two judges dissenting) did not attempt to consider the merits of this transaction, but expressly stated that the present form of action was not presented by that complaint."

all persons similarly situated, it is not essential that each such person should intervene in the suit brought in order that he be deemed thereafter free from the laches which bars those who sleep on their rights. *Cox* v. *Stokes*, 156 N. Y. 491, 511. Nor does failure, long continued, to discover the appropriate remedy, though well known, establish laches where there has been due diligence and, as the lower courts have here found, the defendant was not prejudiced by the delay.

Second. The Southern Pacific contends that adverse decisions in the earlier litigation are a bar either as an estoppel or by way of election of remedies; since the prosecution of some, if not all, of the earlier suits also was actively supported by the minority stockholders' committee, and the plaintiffs are bound as privies to the full extent to which the decrees therein constitute *res judicata*. But in none of these suits was the question here in issue decided. Except in so far as those cases were disposed of on objections to jurisdiction, they decided merely that the foreclosure could not be set aside as fraudulent; that the minority stockholders could not have the reorganization agreement declared fraudulent; and that they could not compel a reduction of the assessment made under it or enjoin distribution of the stock according to its terms. The minority stockholders sought, when presenting the case in the Court of Appeals of New York (*MacArdell* v. *Olcott*, 189 N. Y. 368, 372–373), to have declared the trust which was later decreed in this suit; but that court refused to consider the contention, for the reason that this claim to relief was based upon a theory "widely at variance" with that upon which that action was commenced and tried. Because of such wide divergence the earlier decrees do not operate as *res judicata*. And there is no basis for the claim of estoppel by election; nor any reason why the minority, who failed in the attempt to recover on one theory because unsupported by the facts, should

not be permitted to recover on another for which the facts afford ample basis. *William W. Bierce, Ltd.*, v. *Hutchins*, 205 U. S. 340, 347; *Barnsdall* v. *Waltemeyer*, 142 Fed. Rep. 415, 420; *Standard Oil Co.* v. *Hawkins*, 74 Fed. Rep. 395; *Henry* v. *Herrington*, 193 N. Y. 218.

Third. The Southern Pacific challenges the claim for relief on the ground that it took the new Houston Company stock, not as majority stockholder, but as underwriter or banker under the reorganization agreement. The essential facts are these: While dominating the old company through control of a majority of its stock, the Southern Pacific entered into its reorganization, under an agreement by which the minority stockholders of the old company could obtain stock in the new only upon payment in cash of a prohibitive assessment of $71.40 per share (said to be required to satisfy the floating debt and reorganization expenses and charges), while the Southern Pacific was enabled to acquire all the stock in the new company upon paying an assessment of $26 per share (said to be the amount required to satisfy reorganization expenses and charges). The Southern Pacific asserts that unlike the minority stockholders it assumed an underwriter's obligation to take the new company's stock not subscribed for by the minority and also guaranteed part of the principal and all the interest on the new company's bonds, which were given in exchange for those of the old company. But the purpose of the Southern Pacific in assuming these obligations was in no sense to perform the function of banker. It was to secure the incorporation of the Houston Railroad into its own transcontinental system. And it was never called upon to pay anything under its guaranty.

Fourth. The Southern Pacific contends that the doctrine under which majority stockholders exercising control are deemed trustees for the minority should not be applied here, because it did not itself own directly any

stock in the old Houston Company; its control being exerted through a subsidiary, Morgan's Louisiana & Texas Railroad & Steamship Company, which was the majority stockholder in the old Houston Company. But the doctrine by which the holders of a majority of the stock of a corporation who dominate its affairs are held to act as trustees for the minority, does not rest upon such technical distinctions. It is the fact of control of the common property held and exercised, not the particular means by which or manner in which the control is exercised, that creates the fiduciary obligation.

Fifth. Equally unfounded is the contention that the Southern Pacific cannot be held liable because it was not guilty of fraud or mismanagement. The essential of the liability to account sought to be enforced in this suit lies not in fraud or mismanagement, but in the fact that, having become a fiduciary through taking control of the old Houston Company, the Southern Pacific has secured fruits which it has not shared with the minority. The wrong lay not in acquiring the stock, but in refusing to make a pro rata distribution on equal terms among the old Houston Company shareholders.

Sixth. The Southern Pacific also urges that the suit must fail because the old Houston Company is an indispensable party and has not been joined. The contention proceeds upon a misconception of the nature of the suit. Since its purpose is merely to hold the Southern Pacific as trustee for the plaintiffs individually of the property which it has received, the old Houston Company is in no way interested and would not be even a proper party.

Seventh. The Southern Pacific also contends that the decree is erroneous because the effect is to give to the minority their pro rata share in the new Houston Company without their having made any contribution towards satisfying the floating indebtedness of the old; whereas, the floating debt creditors had a claim against the property

prior in interest to that of the old company's stockholders. *Kansas City Southern Ry. Co.* v. *Guardian Trust Co.*, 240 U. S. 166; *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482. The fact that no provision was made for the floating indebtedness is not a bar to the minority obtaining relief. They did not come into court with unclean hands because there were floating debt creditors unpaid. If any floating debt creditors have been illegally deprived of rights, it was not by the minority's acts. Whether the terms on which relief should be granted the minority should be affected by the fact that the Southern Pacific had, through a subsidiary, a large interest in the unpaid floating debt, presents a more serious question, which will be considered later.

Eighth. Objection is made by the Southern Pacific to the terms of the decree also on the ground that, in requiring distribution of stock in the old Houston Company to the minority stockholders instead of providing merely for an accounting and compensation in damages, the decree imposes upon it a heavy and unnecessary hardship. This it is said will result from the fact that all the stock of the new Houston Company (except seventeen shares to qualify directors) has been pledged by the Southern Pacific as part collateral for an issue of thirty-five year 4 per cent. bonds to the amount of 250,000,000 francs; and that by reason of a clause in the collateral agreement, by which the Southern Pacific covenants that it is the lawful owner of the securities and that they "are not subject to any prior pledge, charge or equity," a decree requiring distribution of stock to the minority stockholders may conceivably entitle the trustee for these bonds to declare them due; that such default might preclude it from withdrawal of the stock and from substituting other collateral; and that, in any event, if substitution of collateral is permissible, additional securities will have to be deposited, because the agreement provides that in case of withdrawal of any

securities upon request made after September, 1911, those "offered in substitution and those remaining on deposit (in each instance), shall be equal in value, as appraised or reappraised, at the time of such proposed substitution to one hundred and twenty per centum (120%) of the amount of bonds then outstanding hereunder"; and that there had been a heavy depreciation in such other securities since the time of their deposit. The alleged hardship involved in requiring a delivery to plaintiffs of new Houston Company stock *in specie* was made by the interlocutory decree a subject of investigation by the special master; and his report that the requirement would not impose undue hardship appears to have been carefully considered before entry of the final decree; but neither of the lower courts set forth the reasons which led to the rejection of the Southern Pacific's contention. The final decree was entered in the District Court on October 5, 1916. Since then, the World War and the participation in it of the United States have greatly affected financial conditions and security values, especially those involving transportation properties. It may be that the clause in the collateral agreement requiring reappraisal of all securities upon the withdrawal of any might now prove very burdensome. The pledge was made in 1911; and, as the Southern Pacific contends, it was justified then in depositing this stock as collateral, because up to that time the minority stockholders had not made any claim to stock *in specie*. For reasons hereinafter stated the case must be remanded to the District Court for further proceedings with a view to modifying the terms of the decree in other respects. It seems to us proper that the Southern Pacific should also have liberty to present to that court reasons, if any, for believing that the decree as framed will under then existing conditions impose undue hardship upon it.

Ninth. The Southern Pacific objects to the terms of the decree also on the ground that if the minority stockholders

are held entitled to a *pro rata* share of the new company stock, it should be upon payment not merely of the $26 per share required to meet reorganization expenses and charges, but also of the additional sum required to discharge the floating indebtedness. At the time of the reorganization there was outstanding a large floating indebtedness for which on May 17, 1889, judgments were recovered; by the Lackawanna Iron & Coal Company in the sum of $555,914.25; by Morgan's Louisiana & Texas Railroad & Steamship Company in the sum of $1,795,570.81; and by the Southern Development Company in the sum of $858,133.15. The last two companies held as collateral for their claims $880,000 of bonds of the old Houston Company, for which they later received in exchange, bonds of a new company to be applied at their par value toward payment of the debts for which judgment had been recovered. The reorganization agreement provided in substance that the whole $10,000,000 of stock of the new company, if not taken by the old company's stockholders, should be divided pro rata among such of the floating debt creditors as should provide the cash required to pay the floating indebtedness and reorganization expenses and charges but no floating debt creditor took advantage of this provision; and all were thus wiped out in the reorganization.

The Southern Pacific asserts that the Morgan Company was and still is its subsidiary; that it owned and now owns a large part of the stock of that corporation; and that through such stock ownership it is, in effect, a large floating debt creditor of the old Houston Company. It suggests also that it has paid out monies to protect the property of the new company from other floating indebtedness. If the Southern Pacific had been allowed to retain all the stock in the new Houston Company, it would obviously lose nothing by the wiping out of its interest in the floating indebtedness of the old company; and any

money expended by it in protecting the property of the new company would be fully reflected in the increased value of the stock therein, if it owned all. But if part of the new company stock is taken from it and distributed among the minority stockholders, the Southern Pacific will lose and the minority stockholders will gain the pro rata increase in value of the new company stock, due to wiping out of the Southern Pacific's share in the floating debt and to its expenditures made for wiping out other indebtedness.

The Circuit Court of Appeals recognized that there was great force in this contention of the Southern Pacific, but overruled it because it "was never raised in the case by pleading or otherwise until an exception was taken to the report of the special master" and because "there is nothing in the record to show what, if anything, the Southern Pacific Company did give up." The memorandum filed by the district judge on settlement of the interlocutory decree indicates that some such contention was made then. At all events it was clearly made before entry of the final decree; and it does not appear that the minority stockholders were in any way prejudiced by the failure to make the exact contention earlier. There is no reason to believe that the parties cannot determine now, as easily as they might have done a few years ago, to what extent the floating indebtedness due the Morgan Company represents money in effect expended by the Southern Pacific for the benefit of the old Houston Company and to what extent the wiping out of any indebtedness and any expenditure made by the Southern Pacific in connection therewith will enure to the benefit of such of the minority stockholders of the old company as receive stock in the new. Some adjustment should obviously be made so as to compensate the Southern Pacific for any contribution made at its expense to the value of the stock in the new company of which the minority stock-

holders may get the benefit. The purpose of this proceeding is not to punish the Southern Pacific but to declare and enforce its obligation as trustee. The minority stockholders who seek equity should do equity; and a court of chancery has power in granting relief to prevent unjust enrichment of the minority stockholders at the expense of the Southern Pacific. To determine the amount of such contribution by the Southern Pacific and of such benefit to the minority stockholders further investigation by the trial court will be necessary; and the judgments on the floating indebtedness entered in 1889 against the old company should not be held a bar to any enquiry into relevant facts. Whether this compensation shall be made by way of addition to the assessment of $26 per share provided for in the decree; or whether it can and should be made by requiring the minority stockholders to consent to the creation, in favor of the Southern Pacific, of some charge against or interest in the new company which would have priority over the 100,000 shares of stock outstanding, as for instance an income bond or preferred stock; or whether the compensation should be made in some other manner, should, also, be determined in the first instance by the District Court where all the relevant facts can be ascertained. The final decree must be set aside and the interlocutory decree be modified so as to provide for the necessary enquiry; and when all the relevant facts shall have been ascertained, a final decree should be entered which will embody such terms as shall be found to be appropriate to afford to the Southern Pacific appropriate compensation for its contribution.

Tenth. The Southern Pacific objects to the orders permitting Gernsheim and the estate of Minzesheimer to intervene after the entry of the interlocutory decree, and objects also, to the final decree, in so far as it declares these interveners entitled to the relief granted other

minority stockholders. The suit was brought on behalf of all stockholders of the old Houston Company, situated similarly to the plaintiffs. The court found on competent evidence that these parties were such. If they could not have intervened as of right, it was at least within the discretion of the court to permit them to do so; and no reason is shown for questioning the exercise of its discretion. It is also urged that the earlier litigation by Gernsheim bars his claim to relief on the grounds of estoppel or of inconsistency of remedy; but that contention has already been shown to be unfounded.

Eleventh. The certiorari and return were filed May 3, 1918. On October 8, 1918, separate petitions were filed in this court by Henry J. Chase, by Fergus Reid, by Albert M. Polack, by Francis P. O'Reilly, and by The Corn Exchange Bank, alleging that they were respectively owners of stock in the old Houston Company and praying leave to intervene and that they be permitted to share in the benefits of the decree or, in the alternative, that they be permitted to make such application to the District Court. Action on these petitions was postponed to the hearing of the case on the merits. As the case must be remanded to the District Court for further proceedings as above stated, we deny these several petitions without expressing any opinion on their merits and without prejudice to the right to apply to the District Court for leave to intervene and to share in the benefits of the decree.

Decree modified and cause remanded to the District Court for further proceedings in conformity with this opinion, the costs in this court to be equally divided between the parties.

THE CHIEF JUSTICE took no part in the consideration or the decision of this case.

MR. JUSTICE MCREYNOLDS dissenting.

It seems to me quite clear that the judgment below is wholly wrong. Respondents' complaint should be dismissed.

This suit was brought in 1913, some twenty-five years after those who complain came into possession of all material facts. During that period they were parties or privies to suit after suit—the first begun in 1889 and all unsuccessful—which sought to upset what petitioner had done because of its actual fraud.

The original bill or complaint in the present cause alleges:—"As soon as the terms of the said Reorganization Agreement were announced and published, [1888] S. W. Carey, Cornelius MacArdell, Walter B. Lawrence, plaintiffs' testator, and other stockholders of the Railway Company protested against the terms of the said agreement, claiming that it practically gave the Railway Company to the Southern Pacific Company in fraud of the individual stockholders." "Immediately after the entry of the said Consent Decree of May 4th, 1888, the said Carey, MacArdell, Lawrence and other stockholders of the said Railway Company formed a committee of stockholders to protect themselves from the frauds committed and proposed to be committed by the Southern Pacific Company under the said Reorganization Agreement and Consent Decree, and said committee of stockholders employed as counsel, Frederic R. Coudert, Edward M. Shepard and A. J. Dittenhoefer of New York City, Jefferson Chandler of St. Louis, and later on H. Snowden Marshall, Russell H. Landale, and David Gerber, and from the commencement of their first suit [December, 1889] hereinafter mentioned, to the present day, the firm of Dittenhoefer, Gerber & James has been their attorneys of record."

Having long emphatically condemned, attacked, and sought without success to annul petitioner's action, re-

spondents finally come before a court of equity saying in effect—Although represented by counsel of great eminence we have not heretofore known the law; notwithstanding all solemnly declared to the contrary, we now maintain that petitioner was really acting for us, our trustee indeed; and we wish to share in the plan which it has carried to success against our persistent opposition. Such a claim exhales a very bad odor; and I think the parties presenting it should be dismissed, burdened with an appropriate bill of costs, for two very simple reasons.

First. They are barred by laches. Rational men are presumed to know the law; knowledge of consequent rights and appropriate means of asserting them is necessarily implied from full acquaintance with the facts. Respondents' attempt to rely upon an alleged belated discovery of a well known remedy after years of litigation conducted in full view of all the circumstances, affronts both established principles and common experience. And this is emphasized by the names of distinguished counsel who have continuously represented the minority stockholders since 1888.

"Nothing can call a court of equity into activity but conscience, good faith, and reasonable diligence; and when a party with full knowledge of the facts, acquiesces in a transaction and sleeps upon his rights, equity will not aid him." *Hayward* v. *Eliot National Bank*, 96 U. S. 611.

Due diligence in asserting a constructive trust is incompatible with persistent denial of such relationship after full knowledge of all the circumstances and a furious chase for twenty-five years in the opposite direction by the *soi-disant* beneficiary.

Second. Certainly the petitioner never consciously undertook to act as respondents' trustee—for years nobody seems to have thought any such relation existed. When the latter obtained full information of the real facts

[1888], at most, their option was promptly to treat petitioner as their constructive trustee, or to reject that view. And I had supposed in such circumstances, under an elementary rule, failure affirmatively to ratify, approve or adopt the alleged fiduciary's action within a reasonable time amounted to disapproval. A potential *cestui que trust* may not indefinitely speculate on the outcome. In the present case respondents not only failed promptly to approve the action whose benefits they now seek; they deliberately engaged in a long series of actions inconsistent with their present claim; and while they did so petitioner, supposing its title absolute and unquestioned, dealt with the stock accordingly and as it probably would not have done if the present claim had been asserted.

ODELL *v.* F. C. FARNSWORTH COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 186. Submitted March 24, 1919.—Decided June 9, 1919.

A suit by a patentee to compel an accounting for royalties under a contract assigning the patent, *held* not a suit arising under the patent laws, within Jud. Code, § 24, par. 7. P. 503.
257 Fed. Rep. 101, affirmed.

THE case is stated in the opinion.

Mr. Samuel E. Darby for appellant.

No appearance for appellees.

MR. JUSTICE CLARKE delivered the opinion of the court.

This is an appeal from a decree of the District Court for the Southern District of New York, dismissing plaintiff's, appellant's, bill for want of jurisdiction.

The District Court certifies: That the case was heard on the bill of complaint and motion by the defendants to dismiss for want of jurisdiction; that the court ruled that the cause of action stated in the bill is an action on a contract and is not a suit arising under the patent laws of the United States, and that the bill was dismissed for want of jurisdiction, solely because it showed on its face that the matter in controversy is less than $3,000.

The bill shows the requisite diversity of citizenship to give the court jurisdiction, but the amount claimed is only $1,800, and therefore it did not have jurisdiction, (Judicial Code, § 24, 1st paragraph), unless the case is one arising under the patent laws of the United States.

The contention of the appellant is that the suit is one for infringement of a patent and arises under the patent laws and that therefore the court had jurisdiction regardless of the amount involved, Judicial Code, § 24, 7th paragraph.

The allegations of the bill are: That the plaintiff was an inventor of a new and useful "steam trap," upon which he was granted letters patent No. 837,711; that on September 8th, 1914, he made a grant, in writing, to one of the defendants, to which the other defendant succeeded, of the "sole and exclusive right to manufacture and sell all apparatus covered by the patent," . . . "during the whole term of said patent," and that on the same date the defendant, assignee of the patent, agreed in writing to pay plaintiff, in addition to the sum paid for the assignment,—$100 within six months, and a royalty thereafter, of $5 upon each "apparatus" sold until there should be received on account of such royalties the sum of $1,800. It is fur-

ther alleged that the defendants had sold a large number of patented "steam traps" but had accounted and paid for the sale of only five, and that they pretend that the others which they are manufacturing and selling are not covered by the letters patent granted to the plaintiff, and, finally, that the legal title to the patent involved is held by the defendants to use, and pay for the use of, the invention according to the terms of the written contract of September 8, 1914.

The prayer is for a discovery of the number of "steam traps" covered by the patent which the defendants have sold and for a decree that they "account for and pay over to your orator the amount of royalties thereon which the defendants are required to do under the agreement herein referred to" and for the costs of suit.

Thus, neither the allegations nor the prayer of the bill aims at annulling or even modifying either the assignment of the patent or the contract on account of the breach of the latter, but on the contrary, plainly, the case intended to be stated, is one to enforce the contract and collect the royalties stipulated in it. Infringement of the patent is not alleged but, on the contrary, a completed grant and assignment of the legal title to it is pleaded, sufficient on its face, while unmodified, to disable the plaintiff from maintaining a suit for any infringement subsequent to the date of such assignment.

To constitute a suit under the patent laws the "plaintiff must set up some right, title or interest under the patent laws, or at least make it appear that some right or privilege will be defeated by one construction, or sustained by the opposite construction of these laws." *Pratt* v. *Paris Gas Light & Coke Co.*, 168 U. S. 255, 259.

The party who brings suit is "master to decide what law he will rely upon," and the allegations of his bill are the evidence, or the expression, of his decision, upon which the courts must act in determining the question of

their jurisdiction. *The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22; *Healy* v. *Sea Gull Specialty Co.*, 237 U. S. 479.

It is too clear for discussion that the case stated in the bill is a suit for royalties based on the contract, and not at all involving the construction of any law relating to patents. It has been often decided by this court that such a suit is not one arising under the patent laws, and since less than the requisite jurisdictional amount is claimed the District Court did not err in dismissing the bill. *Wilson* v. *Sanford*, 10 How. 99; *Dale Tile Mfg. Co.* v. *Hyatt*, 125 U. S. 46; *Albright* v. *Teas*, 106 U. S. 613; *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.*, 185 U. S. 282; *Briggs* v. *United Shoe Machinery Co.*, 239 U. S. 48.

The decree of the District Court must be

Affirmed.

BOWERMAN *v.* HAMNER, AS RECEIVER OF THE FIRST NATIONAL BANK OF SALMON.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 289. Argued April 28, 29, 1919.—Decided June 9, 1919.

In addition to the specific duties defined in the National Banking Law, a director of a national bank is under a common-law obligation, to depositors and shareholders as well as to borrowers, to exercise at least ordinary care and prudence in the supervision and administration of the bank's affairs. P. 510.

While knowledge may be essential to render a director liable as for a breach of a duty specially imposed by the statute, this does not prevent application of the common-law rule in measuring violations of common-law duties. P. 511.

Both kinds of liability may be asserted in one bill of complaint. *Id.*

A director of a national bank who wilfully fails to attend the meetings

of the board of directors and otherwise to inform himself of the condition of the bank and to supervise its affairs is guilty of a breach of his common-law obligation, and liable for losses resulting from gross mismanagement by the executive officers which a proper attention to his duties might have avoided. P. 513.

The fact that the director resides at a distance from the location of the bank does not excuse him from this responsibility. P. 514.

Where a director of a national bank, charged in the same bill with both statutory and common-law liability, secured a dismissal of the bill on the plaintiff's proofs without introducing any evidence of his own, and the Circuit Court of Appeals reversed the case and directed a decree against him on the ground that the common-law liability was established, *held*, that the defendant was not entitled to a new trial of that issue upon the ground that the case in the District Court had been treated as involving only the statutory liability. *Id.*

Under Rev. Stats., § 5145, a director of a national bank remains responsible as such in the absence of evidence that he has resigned or refused to qualify when reëlected. *Id.*

241 Fed. Rep. 737, affirmed.

THE case is stated in the opinion.

Mr. Oliver O. Haga, with whom *Mr. James H. Richards*, *Mr. McKeen F. Morrow* and *Mr. J. L. Eberle* were on the brief, for appellant.

Mr. J. M. Stevens, with whom *Mr. Milton C. Elliott*, *Mr. Jesse R. S. Budge* and *Mr. H. E. Ray* were on the brief, for appellee.

MR. JUSTICE CLARKE delivered the opinion of the court.

This is a suit, commenced in the United States District Court for the District of Idaho, Eastern Division, by the Receiver of the First National Bank of Salmon, against the former executive officers and directors of the bank to obtain an accounting and decree for money lost by the alleged unlawful and negligent management of the affairs of the bank.

The sole appellant, Bowerman, was a director, but not an executive officer, of the bank from its organization in January, 1906, until its failure in August, 1911, and, as owner of $10,000 of the capital stock, he was the largest stockholder but one.

The bank was located in a small town in Idaho. It had a capital stock of only $25,000, which was increased, in February, 1910, to $50,000, and it had a book surplus of $15,000,—$5,000 of which was improperly carried to the surplus account in July, 1910, when the capital was certainly impaired.

When the plaintiff rested, the appellant moved that the bill be dismissed as to him, announcing that he would not introduce any evidence in his own behalf, and at the conclusion of the trial the District Court granted his motion. On appeal the Circuit Court of Appeals reversed this judgment, found Bowerman liable, and in the decree, which we are reviewing, remanded the case to the District Court with direction to enter a decree in conformity with the views expressed in its opinion.

The amended bill, on which the case was tried, is framed in fact, though not in form, in the alternative, averring, first, that the executive officers made and that the directors knowingly permitted them to make, three designated loans, each in excess of one-tenth part of the paid in and unimpaired capital stock and surplus of the bank, in violation of § 5200 of the Revised Statutes of the United States. It then proceeds to allege: that, beginning with January, 1910, the affairs of the bank were grossly mismanaged by the executive officers, with the negligent permission of appellant and other directors; that of the three designated loans, on which large losses were sustained, the first was made to the Salmon Lumber Company, a corporation without financial resources to justify such a loan without security, and with its capital stock owned principally by members of the family of the president of the

bank; that the two other designated loans were negligently made to persons without financial standing and without security sufficient to justify the making of them; that overdrafts aggregating large amounts were permitted to be made by many persons, in violation of the by-laws of the association, and that a dividend on the capital stock was declared and paid in July, 1910, when the capital stock and surplus of the bank had been much impaired and its assets greatly depreciated. This gross mismanagement, it is averred, caused the failure of the bank and the loss for which recovery is prayed.

With respect to appellant Bowerman, it is specifically alleged that in disregard of his oath as a director to diligently and honestly administer the affairs of the bank, he negligently and wilfully failed: to attend a single meeting of the board of directors, to at any time examine, or cause to be examined, the books and papers of the bank to ascertain its condition, or to in any manner inform himself as to the loans and overdrafts that were being made during the long period of mismanagement by the executive officers. It is alleged that the exercise by him as a director of a proper supervision of the affairs of the bank would have prevented the mismanagement complained of and the loss which resulted from it.

Appellant's answer to the bill is substantially a general denial.

The evidence applicable to the allegations against Bowerman may be summarized as follows:

He was a director during the entire five and one-half years of the existence of the bank, but never attended a single directors' meeting, regular or special. The only justification or excuse he offers for such conduct is that he lived about 200 miles from the town in which the bank was located and that communication between the two places was difficult.

In a letter, which is in evidence, written by him to the

president of the bank in 1911, after the failure, he refers to himself as "a nominal director," and says that prompted by a published statement of the bank, which he had seen in 1910, he began writing to the president, warning him of the consequences if the "very hazardous manner of conducting the bank" was not changed, "various matters corrected and improved and more of the notes collected, and the reserve kept up." In this letter he says that he had never been "consulted, either as to the management of the bank, its business transactions or its policy," and that he had never received a statement of its condition, either the usual published statement or one for his personal use, without making request for it, and that in some cases he had been obliged to write several times before one was sent to him. The record, however, does not show that any communication of the kind described in this letter was ever written by him prior to the failure.

The only certified copies in evidence of the oath taken by Bowerman as a director are for the years beginning in January, 1909, and in January, 1910. They are in the form prescribed by statute, that the affiant will "diligently and honestly administer the affairs of said association, and will not knowingly violate, or willingly permit to be violated, any of the provisions" of the statutes of the United States under which the association was organized.

The by-laws of the bank are in evidence and they require "that regular meetings of the directors shall be held on the first Tuesday of each month;" that a "loans committee," to be composed of the president, cashier and one director, shall make a report to each meeting of the board of directors of all bills, notes, and other evidences of debt discounted and purchased since its last previous report; that no officer or clerk shall pay any check drawn upon the bank unless the drawer at the time of its presentation had sufficient funds on deposit to meet it; that a committee of three directors shall examine the affairs of the bank

every month to see whether it is in sound and solvent condition and to recommend changes which may seem desirable in the manner of doing business.

In addition to these, there was a special by-law adopted on January 18, 1910, upon the suggestion of the Comptroller of the Treasury, requiring that "the Board of Directors of the bank shall, at each monthly meeting, or oftener, examine and approve all loans and discounts, and such approval shall be recorded in a book kept for that purpose."

Some of these by-laws were flagrantly disobeyed for years before the failure, and the others were observed in a manner so perfunctory as to amount to a disobedience of them. The three large loans complained of were never reported to the board of directors, except fragmentarily from time to time when indistinguishably incorporated with other overdrafts, although they were gradually accruing during many months.

When the bank failed its liabilities were $273,719.14 and its assets, nominally $325,624.12, from which, assuming that the stockholders' liability was not included in them, (as to which the record is not clear), there was realized about $220,000, thus showing a shrinkage of approximately $100,000 in the resources of a bank with a capital and surplus of $60,000.

The District Court, with the full record before it, found the aggregate of the three excessive loans at the time the bank failed to be $35,700. Each of these loans was made up by allowing unsecured overdrafts to accumulate over a considerable period of time and then permitting them to be converted into unsecured notes.

Without going more into the details, there can be no doubt that the business of the bank was surrendered wholly to the president and cashier, and was grossly mismanaged after January, 1910, in utter disregard of the national banking laws and of the by-laws of the association, and that this mismanagement was of such a charac-

ter that even slight care in the discharge of his duties as a director must have led Bowerman, an experienced banker, to discover the trend of the management and to have prevented the greater part, if not all, of the losses which resulted in the failure.

The appellant relies chiefly upon the assignment of error that there is no evidence in the record to show that he knowingly consented to the making of the three loans in excess of the limit imposed by Rev. Stats., § 5200, and therefore, he argues that under the rule prescribed in *Yates* v. *Jones National Bank*, 206 U. S. 158, and *Jones National Bank* v. *Yates*, 240 U. S. 541, the decree of the Circuit Court of Appeals holding him liable is erroneous and should be reversed.

While the cited cases hold that, in a suit for damages against national bank directors, based solely upon a violation of duty imposed by the national bank act, it is not enough to show a negligent violation of the act, but that something more, in effect an intentional violation, must be shown to justify a recovery, and that this is the exclusive rule for measuring the responsibility of directors as to such violations, yet, it is expressly pointed out in the opinion of the court, that the act does not relieve such directors from the common-law duty to be honest and diligent, as is shown by the oath which they are required to take to "diligently and honestly administer the affairs of such association" as well as not to "knowingly violate, or willingly permit to be violated, any of the provisions of this Title,"—the National Bank Act.

The rule thus announced would perhaps be applicable if the bill were limited to the charge of liability based solely upon the statutory prohibition of excessive loans, for it is reasonably clear that Bowerman did not have actual knowledge of the making of the loans or of anything else connected with the conduct of the bank. He deliberately avoided acquiring knowledge of its affairs and

wholly abdicated the duty of supervision and control which rested upon him as a director.

The National Bank Act imposes various specific duties on directors other than those imposed by the common law and it is obviously possible that a director may neglect one or more of the former and not any of the latter, or *vice versa*. For example, in this case we have the gross negligence of the appellant, in failing to discharge his common-law duty to diligently administer the affairs of the bank, made the basis for the contention that he did not "knowingly" violate his statutory duty by permitting the excessive loans to be made. While the statute furnishes the exclusive rule for determining whether its provisions have been violated or not, this does not prevent the application of the common-law rule for measuring violations of common-law duties. And there is no sound reason why a bill may be not so framed that, if the evidence fails to establish statutory negligence but establishes common-law negligence, a decree may be entered accordingly, and thus the necessity for a resort to a second suit avoided.

The bill in this case is given, as we have seen, this broader scope, and contains the charge of statutory as well as common-law negligence on appellant's part, resulting in the loss complained of. Such pleading was accepted as proper practice in *Briggs* v. *Spaulding*, 141 U. S. 132, 142, 165, in which a bill thus "framed upon the theory of a breach by the defendants as directors 'of their common-law duties as trustees of a financial corporation and of breaches of special restrictions and obligations of the national banking act,'" was under consideration by this court, and, upon a full review of the decisions, the rule for determining the common-law liability of directors of such banks was twice stated, once on p. 152:

"In any view the degree of care to which these defendants were bound is that which ordinarily prudent and

diligent men would exercise under similar circumstances, and in determining that the restrictions of the statute and the usages of business should be taken into account. What may be negligence in one case may not be want of ordinary care in another, and the question of negligence is, therefore, ultimately a question of fact, to be determined under all the circumstances."

And again, in the final summing up, on p. 165:

"Without reviewing the various decisions on the subject, we hold that the directors must exercise ordinary care and prudence in the administration of the affairs of a bank, and that this includes something more than officiating as figure-heads. They are entitled under the law to commit the banking business, as defined, to their duly-authorized officers, but this does not absolve them from the duty of reasonable supervision, nor ought they to be permitted to be shielded from liability because of want of knowledge of wrong-doing, if that ignorance is the result of gross inattention."

In an earlier case, *Martin* v. *Webb*, 110 U. S. 7, 15, it was said:

"Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect the officers of the bank, and to make declarations of dividends. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

This latter statement of the rule is made in a case dealing only with borrowers from the bank, but there is no

good reason why it should not be applied for the protection of depositors and stockholders.

While the rule as thus formulated in *Briggs* v. *Spaulding*, *supra*, has been thought by some state courts of last resort to be an under-statement of the law of the duty of bank directors, it is amply broad, without re-statement, for the disposition of the case before us.

That ordinarily prudent and diligent men, accepting election to membership in a bank directorate, would not wilfully absent themselves from directors' meetings for years together as Bowerman did cannot be doubted; that a director who never makes, or causes to be made, any examination whatever of the books or papers of the bank to determine its condition and the way in which it is being conducted, does not exercise ordinary care and prudence in the management of the affairs of the bank is equally clear, and that Bowerman, when guilty of neglect in both of these respects, did not exercise the diligence which prudent men would usually exercise in ascertaining the condition of the business of the bank or a reasonable control and supervision over its affairs and officers is likewise beyond discussion. He cannot be shielded from liability because of want of knowledge of wrong-doing on his part, since that ignorance was the result of gross inattention in the discharge of his voluntarily assumed and sworn duty.

Bowerman was a banker, and the letter, from which we have quoted, written to the president of the bank which failed, shows he so understood the business of banking and what was necessary for the safe conduct of it that even slight care on his part in the discharge of his duty as a director must have discovered and arrested what he himself characterized as a hazardous manner of conducting its affairs. He was a man of such importance and reputation that the use of his name must have contributed to securing the confidence of the community and of

depositors for the bank, and it would be a reproach to the law to permit his residence at a distance from the location of the bank, a condition which existed from the time he first assumed the office of director, to serve as an excuse for his utter abdication of his common-law responsibility for the conduct of its affairs and for the flagrant violation of his oath of office when it resulted in loss to others.

It is argued that the decree of the Circuit Court of Appeals should be reversed and the cause remanded for a new trial for the reason that the trial in the District Court was on the theory that only the charge of statutory liability was involved and to be met by the appellant, and that he should have an opportunity to produce evidence, if he desires, on the issue of common-law liability.

At his peril the appellant put the construction on the pleadings which, for the reasons stated in this opinion, was erroneous. The suit was in equity and he was charged with notice that the decision of the trial court was subject to review on both the law and the facts and, although he was present in court during the trial, he neither took the stand to testify in his own behalf nor offered any evidence upon the question of his liability. The interests represented by the receiver are entitled to consideration as well as those of the appellant and the contention cannot be allowed.

It is also urged that the appellant resigned his office as director some time before the bank failed and that the decree of the Circuit Court of Appeals renders him liable for transactions after his resignation.

The only showing on this subject in the record is the averment in appellant's answer that he was not a director of the bank after about the first day of July, 1910, and that he refused to qualify when notified of his re-election in January, 1911. These allegations must be deemed denied under the 31st Equity Rule. The only evidence in

the record on the subject is the oath of office taken by appellant in January, 1910, and the testimony of the receiver that the letter from the appellant to the president of the bank, from which we have quoted, was the only letter from him which he found, among the papers which came into his possession as receiver, bearing on the mismanagement of the bank,—and that letter was written after the failure. Section 5145 of the Revised Statutes provides that directors shall hold office for one year and until their successors are elected and have qualified. In the absence of evidence that the appellant resigned or refused to qualify when re-elected in January, 1911, we must agree with the Circuit Court of Appeals in the conclusion reached, with the full record before it, that he continued to be a director "from the organization of the bank until the receiver took charge."

Other claims of error, chiefly technical, have been pressed upon our attention, and have all been considered and found to be without substantial merit. Conduct such as this appellant was so palpably guilty of is not to be weighed in the scales of an apothecary. The decree of the Circuit Court of Appeals must be

Affirmed.

MR. JUSTICE MCKENNA and MR. JUSTICE MCREYNOLDS dissent.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1919.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1919.

CENTRAL OF GEORGIA RAILWAY COMPANY *v.* WRIGHT, COMPTROLLER GENERAL OF THE STATE OF GEORGIA.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 30. Reargued October 13, 14, 1919.—Decided October 27, 1919.

The provisions in the charters granted in 1845 to the Southwestern and Muscogee Railroads limiting their tax liabilities to a certain per cent. of net income are to be construed like similar provisions in the earlier charters of the Augusta & Waynesboro (1838) *et al.* (*Cf. s. c.*, 248 U. S. 525; *Wright* v. *Central of Georgia Ry. Co.*, 236 U. S. 674) as extending to a lessee; there being no ground to hold that the policy of the legislature had changed in the interim, although provisions in the earlier charters affording express evidence that it contemplated the income derived from letting as well as that from using and sharing the railroads are absent from the later charters. P. 523.

The policy remained the same when express power to let was given in 1852. P. 524.

Merger of the Muscogee with the Southwestern under an act of 1856 did not affect the tax exemption. *Id.*

The court finds nothing in the later statutes or constitutions of Georgia that attempts to supplant or impair the tax limitations in the charters of the Southwestern and Muscogee Railroads. *Id.*

146 Georgia, 406, reversed.

IN this case a rehearing was granted "in so far as the validity of the tax in question is involved in or depends upon the charters of the Southwestern and the Muscogee Railroad and the subsequent relevant legislation." As to all other questions, leave to file the application for rehearing was denied. 249 U. S. 590.

The judicial history of the charter tax exemptions is to be found in the following cases: *Central R. R. & Banking Co.* v. *Macon* (1871), 43 Georgia, 605; *Central R. R. & Banking Co.* v. *State* (1874), 54 Georgia, 401; *Southwestern R. R. Co.* v. *State* (1874), 54 Georgia, 401; *Central R. R. & Banking Co.* v. *Georgia* (1875), 92 U. S. 665; *Southwestern R. R. Co.* v. *Georgia* (1875), 92 U. S. 676; *Wright* v. *Southwestern R. R. Co.*, 64 Georgia, 783; *Southwestern R. R. Co.* v. *Wright* (1886), 116 U. S. 231; *Central R. R. & Banking Co.* v. *Wright* (1896), 164 U. S. 327; *Wright* v. *Central of Georgia Ry. Co.* (1915), 236 U. S. 674; *Central of Georgia Ry. Co.* v. *Wright* (1919), 248 U. S. 525.

Mr. T. M. Cunningham, Jr., and *Mr. A. R. Lawton* for plaintiff in error.

Mr. Warren Grice for defendant in error:

The original charters of the Southwestern and Muscogee Railroads, unlike the charter of the Georgia R. R. & Banking Company, construed by this court in 236 U. S. 687, and that of the Augusta and Waynesboro (afterwards Augusta and Savannah), construed in the previous decision of this case, 248 U. S. 525, contain no reference to a renting, lease or other disposition of the railroads beyond operation by the grantee corporations. The tax immunity was purely personal. It can not be said of either charter that it "contemplated" or "permitted" any extension of the tax contract to another. They fall, therefore, within the general rule confining the immunity to the immediate grantee in the absence of express words to the contrary,

and this distinction was fully recognized in *Morris Canal Co.* v. *Baird*, 239 U. S. 132, and *Rochester Ry. Co.* v. *Rochester*, 205 U. S. 247.

The Act of January 22, 1852, Laws 1851–1852, p. 119, authorized the Central R. R. & Banking Company to lease certain connecting railroads, namely the Augusta and Savannah and the Southwestern, and authorized them to lease to the Central, for a term of years or during their respective charters. This act did not include the Muscogee, which never connected with the Central. The Act of 1856, Laws 1856, p. 187, provided for the consolidation of the Muscogee and the Southwestern companies under the charter of the latter. Neither of these acts referred to taxation or to immunity from taxation. The bare privilege to lease given was not acted on till June, 1869. If the Act of 1852 had attempted to extend the exemption to the lessee, it would be of importance to consider that in the meanwhile the Georgia Code of 1863 had gone into effect which made sweeping changes in the status of corporations (see *Atlantic & Gulf R. R. Co.* v. *Georgia*, 98 U. S. 359), and the Constitution of 1868 had been adopted, making uniform *ad valorem* taxation the system of the State; and the question would have been whether the Act of 1852, which was a mere offer on the part of the State until acted on, should not be considered as modified by all the subsequent legislation affecting the subject of taxation. That there was no contract till acceptance in 1869, see *Southwestern R. R. Co.* v. *State*, 54 Georgia, 402; *Buffalo Railroad Co.* v. *Falconer*, 103 U. S. 821. And that all the then body of laws was part of the contract, see *Great Northern Ry. Co.* v. *Minnesota*, 216 U. S. 206, and cases cited.

But the whole question is removed by noting that the Act of 1852 makes no attempt to extend any immunity to the lessee. And an immunity from taxing power never arises from silence or by implication, but only from express terms that admit of no other reasonable construction.

Yazoo & Mississippi Valley R. R. Co. v. *Adams*, 180 U. S. 1, 22; *Phœnix Insurance Co.* v. *Tennessee*, 161 U. S. 174; *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 146; *Southwestern R. R. Co.* v. *Wright*, 116 U. S. 231.

While the interest remaining in the lessor was still protected by the personal contract against taxation higher than one-half per cent. on its net annual income, to wit, the reserved rental on the road; the interest acquired by the lessee remained, under the general law, liable to be taxed as the property of the lessee. It is true that in 1869 there existed no law for the separate taxation of the leasehold interest in property, unless the provisions of the Constitution of 1868 and the Code in requiring all property to be taxed uniformly *ad valorem*, implied it. But that fact did not fetter the legislature, or prevent the passage of laws for its taxation. *Jetton* v. *University of the South*, 208 U. S. 500.

But the present plaintiff was organized in 1895 under the general railroad incorporation law of 1892, Code 1911, § 872 *et seq.*, by those who purchased the property of the Central R. R. & Banking Company, including the lease of the Southwestern Railroad, at foreclosure, and took the new lease, here in controversy, of the Southwestern and Muscogee Railroads, made by the Southwestern Company, in substitution for the old one. By the express terms of its charter it took its existence and its right to run these railroads "subject to Article 4 of the Constitution of the State, and all the laws governing railroad companies at the date hereof or that may hereafter come of force," etc. That article established uniform *ad valorem* taxation of all property, and forbade special immunities and exemptions. The laws then in existence separately taxed all "interests less than the fee" to the owners. This new charter is as much a contract as any other, and the agreements in it in favor of the State are as much to be enforced and respected as those in favor of the corporation. Having thus agreed

to pay taxes according to the constitution and laws, and been allowed existence on that express condition, the corporation would be estopped to assert an exemption if it had acquired one. It would be waived.

The statute under which the charter was granted, being by an elementary principle part of the charter, also in express terms excepted "any exemption from taxation, either State, County or Municipal," doubly emphasizing the State's insistence that no corporation formed under it should exercise any such immunity. *Rochester Ry. Co.* v. *Rochester*, 205 U. S. 254, 255; *Great Northern Ry. Co.* v. *Minnesota*, 216 U. S. 229.

The provision in question is not in the nature of a commuted tax on property. But if it were, the general principle confining the exemption to the grantee would be applicable. *Stearns* v. *Minnesota*, 179 U. S. 255; *Southwestern R. R. Co.* v. *Wright*, 116 U. S. 231.

The right to lease was not an original right of the Southwestern and Muscogee Companies. It seems never to have been given the Muscogee Company, since it was not named or described in the Act of 1852. No extension of the exemption of the lessor to the lessee as to its interest acquired by the lease is to be implied from the mere permission to lease. *Jetton* v. *University of the South*, 208 U. S. 501.

Taxing the lessee separately on its interest can not result in double taxation.

Confusion of earnings waived the exemption. *Railroad Co.* v. *Maine*, 96 U. S. 499.

MR. JUSTICE HOLMES delivered the opinion of the court.

In this case it was decided at the last term that the plaintiff in error, the railway company, was exempt from liability to taxation as lessee of certain roads, 248 U. S. 525, as it had been decided a few terms earlier that it was exempt from taxation upon the fee of the same roads.

236 U. S. 674. A rehearing was granted on the question whether the exemption thus adjudged to exist extends to portions of the plaintiff in error's road let to it by the Southwestern Railroad and the Muscogee Railroad, which were assumed to be embraced in the decision but were not specially discussed. The consideration of the court was directed especially to the charter of the Augusta and Waynesboro Rail Road granted in 1838 and having features characteristic of the conception of railroads then entertained. 236 U. S. 678, 679. It is argued that the charters of the other lessors just named, granted at a later date, even when limiting the corporation's liability to taxation in similar words, should be construed in a different way.

The charters of the Southwestern and the Muscogee Railroads were not granted until 1845, and while like the earlier ones they provided that the said railway and its appurtenances and all property therewith connected, or the capital stock of the said Rail Road Company, should not be subject to be taxed higher than one-half of one per cent. upon its annual net income, they did not contain the provisions that showed the legislature in 1838 to contemplate indifferently a revenue derived from using, from sharing, or from letting the special privileges granted—provisions that were of weight in the decision of the court.

But we are satisfied that between 1838 and 1845 there had been no such change in the policy of Georgia as to require the same words to be given a different meaning at the later date from that which we have decided that they had at the former. Circumstances had not changed when express power to let was given in 1852. The Muscogee was merged in the Southwestern under an act of 1856, but the exemption remained superior to legislative change. *Southwestern R. R. Co.* v. *Georgia*, 92 U. S. 676. As remarked by Chief Justice Waite in a like suit between the same parties, the language of the exempting clause is somewhat unusual, and means the railroad specified in the

charter and none other. *Southwestern R. R. Co.* v. *Wright*, 116 U. S. 231. But conversely it means that that road shall be exempt while owned by this corporation whether used or demised.

We see nothing in the later statutes or constitutions that attempts to substitute a new contract or to impair the obligation of the one originally made. Different opinions were entertained on the main question which this rehearing does not reopen; but taking that as settled we cannot believe that any real distinction can be made between the charter of the Augusta and Waynesboro and those of the Southwestern and Muscogee roads.

The decree of last term must stand and that of the state court must be reversed.

Decree reversed.

MR. JUSTICE MCKENNA, MR. JUSTICE PITNEY, MR. JUSTICE BRANDEIS and MR. JUSTICE CLARKE dissent.

MAXWELL ET AL., EXECUTORS OF McDONALD, *v.* BUGBEE, COMPTROLLER OF THE TREASURY OF THE STATE OF NEW JERSEY, ET AL.

HILL, ADMINISTRATOR OF HILL, *v.* BUGBEE, COMPTROLLER OF THE TREASURY OF THE STATE OF NEW JERSEY, ET AL.

ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

Nos. 43, 238. Argued March 18, 19, 1919.—Decided October 27, 1919.

Article IV, § 2, par. 1, of the Constitution, was intended to prevent discrimination by the several States against citizens of other States in respect of the fundamental privileges of citizenship. P. 537.

The Fourteenth Amendment recognizes a distinction between citizenship of the United States and citizenship of one of the States, and its purpose in declaring that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States is not to transfer to the Federal Government the protection of civil rights inherent in state citizenship but to secure those privileges and immunities that owe their existence to the Federal Government, its national character, its Constitution, or its laws. P. 537. *Slaughter-House Cases*, 16 Wall. 36.

These privileges and immunities provisions do not prevent a State from taxing the privilege of succeeding by will or inheritance from a non-resident decedent to property within its jurisdiction. P. 538.

Quære: Whether these privileges and immunities clauses are applicable when the alleged discrimination (in a state inheritance tax law) is based not on citizenship but on the residence or non-residence of the decedent? *Id.*

The fact that a state tax on the succession to local property of a non-resident decedent is measured by the ratio in value of such property to the entire estate, including real and personal property in other States, does not make it a tax on the property beyond the jurisdiction and thus obnoxious to the due process clause of the Fourteenth Amendment. P. 539.

The difference between the relations to the State of resident and non-resident testators or intestates affords justification within the equal protection provision of the Fourteenth Amendment for measuring succession taxes in different ways. P. 540.

The question of equal protection must be decided between resident and non-resident decedents as classes, rather than by the incidence of the tax in particular cases. P. 543.

The New Jersey inheritance tax, as to estates of resident decedents, is measured on all the property passing testate or intestate under the law of the State (foreign realty excluded), with various exemptions and graduations based on relationship of beneficiaries and amounts received; as to estates of non-residents, the tax on the transfer to the personal representative, respecting only local real and tangible personal property, stock of New Jersey corporations and of national banks located in the State, bears the same ratio to the entire tax which would be imposed under the act if the decedent had been a resident and all his property real and personal had been located within the State, as such property within the State bears to the entire estate wherever situate, specific devises or bequests of property within the State being excluded from this computation. Owing to

525. Argument for Plaintiffs in Error.

the graduation and exemption features, this plan of apportionment, in cases of certain large estates of non-residents, embracing large real estate and other assets in other States, resulted in greater taxes for the transfer of their property in New Jersey than would have been assessed for transfer of an equal amount of property of a decedent dying resident in the State. *Held*, that such taxes did not infringe the privileges and immunities provision of Article IV of the Constitution; or the like provision, or the equal protection or due process clauses, of the Fourteenth Amendment.

90 N. J. L. 707; 92 *id.* 514, affirmed.

THE cases are stated in the opinion.

Mr. Lawrence Maxwell and *Mr. E. C. Lindley*, with whom *Mr. William A. Smith* was on the brief, for plaintiffs in error.

The plan of the last paragraph of § 12 of the taxing act, which provides a method of assessing the tax on the transmission of non-resident estates, is designed to assess a larger tax against such transmission than is provided by § 1 for the transmission of property of resident decedents. If this be denied, then, in the case of non-residents, the act is designed to assess a tax on the transmission of property situated without the State of New Jersey and over which the State of New Jersey has no jurisdiction for the purposes of taxation, and which is not transmitted through the aid and assistance of any law of the State of New Jersey.

By the imposition of the tax in question the Constitution of the United States is violated as follows:

(a) By the inclusion of real estate situate without the State of New Jersey in the computation of the tax on the transfer of a non-resident's estate, and the exclusion thereof in the computation of the tax on the transfer of a resident's estate.

(b) By assessing on the entire estate of a non-resident a tax figured at the graduated rates and then apportioning

the tax according to the proportion of property situated in New Jersey, the transfer of which is subject to a tax, to the entire estate of decedent, instead of first apportioning among those taking (and before figuring a tax on their shares) the New Jersey property subject to a transfer tax and then assessing the tax thereon.

(c) By deducting from the entire share of the non-resident decedent passing to the beneficiary the exemption of each beneficiary in the non-resident's estate, instead of making the deduction from each beneficiary's share in the New Jersey assets. By the deduction of the amount of exemption from his entire share, each beneficiary receives only a proportion of the exemption.

The method of assessment provided for violates the Federal Constitution for the following reasons:

(a) It taxes non-residents more than it does residents and therefore gives to residents privileges and immunities denied to non-residents. *Paul* v. *Virginia*, 8 Wall. 168; *Ward* v. *Maryland*, 12 Wall. 418; *Blake* v. *McClung*, 172 U. S. 239; *Corfield* v. *Coryell*, 6 Fed. Cas. 546; *Magill* v. *Brown*, 16 Fed. Cas. 408, 428; *State* v. *Julow*, 129 Missouri, 163; *State* v. *Betts*, 24 N. J. L. 555, 557; *Louisville & Nashville R. R. Co.* v. *Gaines*, 3 Fed. Rep. 266, 278; *Tatem* v. *Wright*, 23 N. J. L. 429; *Estate of Johnson*, 139 California, 532; *Estate of Mahoney*, 133 California, 180; *Estate of Leland Stanford*, 126 California, 112.

(b) It taxes the transfer of a non-resident's property over which the State of New Jersey has no jurisdiction while it expressly omits like property of residents, that is, non-resident real estate, and thereby deprives the non-resident of his property without due process of law. *International Paper Co.* v. *Massachusetts*, 246 U. S. 135; *Looney* v. *Crane Co.*, 245 U. S. 178; *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Louisville Ferry Co.* v. *Kentucky*, 188 U. S. 385; *Beers* v. *Edwards*, 84 N. J. L. 32; *Carr* v. *Edwards*, 84 N. J. L. 667.

(c) It provides for a tax which bears unequally and therefore is not imposed upon a uniform rule and it therefore denies to non-residents the equal protection of the laws. *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283; *Gulf &c. Ry. Co.* v. *Ellis*, 165 U. S. 150; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79; *State* v. *Julow*, 129 Missouri, 163; *In re Van Horne*, 74 N. J. Eq. 600; *Meehan* v. *Board of Excise*, 73 N. J. L. 382; *Middleton* v. *Middleton*, 54 N. J. Eq. 692.

The objections that the act taxes property beyond the State and is laid unequally undoubtedly may avail the executors and beneficiaries on their own behalf as well as on behalf of their decedents; but, independently, the Constitution protects the right to transmit property on death against discrimination between resident and non-resident decedents. The cases cited in the court below to the effect that taxes of this kind are on the right to succeed and not on the right to transmit did not turn on that contention but on distinguishing between a property and a transfer tax. Many cases might be cited which refer to the right to transmit as well as to the right to succeed. See *Howell* v. *Edwards*, 88 N. J. L. 134, quoting *Neilson* v. *Russell*, 76 N. J. L. 27; *Attorney General* v. *Stone*, 209 Massachusetts, 186; *United States* v. *Perkins*, 163 U. S. 625, 628; *Paul* v. *Virginia*, *supra*, 180; *Brennan* v. *United Hatters*, 73 N. J. L. 729, 742.

The right to transmit property on death is a property right, and this right affects the value of the property to the deceased in his lifetime. If the legislature might discriminate between resident and non-resident decedents and limit the non-resident in his right to dispose of property within the State on his death, or appropriate part or all, surely the property would not be worth as much to him as it would be worth to a resident.

If the State's contention is well founded, then there is no federal constitutional provision insuring equality as

between resident and non-resident decedents, who are citizens of States of the United States, other than the State of New Jersey, in the right of equal application of the laws of descent and transmission of property on death. This court may well hesitate before confirming to the legislature any such arbitrary power.

This provision is nearly as important in keeping the Union together as is the commerce clause of the Federal Constitution. The denial of its protection would permit the state legislature to provide by law for appropriation, on death, of the property of a non-resident citizen within the State's jurisdiction, and to provide otherwise as to its own residents.

The court will keep in mind the distinction between the idea of the sovereignty of the State, under the Roman law and that under the English law determined from the Bill of Rights. Surely that which may be granted to aliens by treaty (*Mager* v. *Grima*, 8 How. 490; *Succession of Rixner*, 48 La. Ann. 552), may not be denied to citizens. But the right has not been claimed by any States other than California, and when claimed in that State has not been sustained. See *Estate of Johnson*, 239 California, 532.

Mr. John R. Hardin for defendants in error.

MR. JUSTICE DAY delivered the opinion of the court.

These cases were argued and submitted together, involve the same constitutional questions, and may be disposed of in a single opinion. The attack is upon the inheritance tax law of the State of New Jersey, and is based upon certain provisions of the Federal Constitution. The statute has reference to the method of imposing inheritance taxes under the laws of the State. The constitutionality of the law upon both state and federal grounds was upheld in the McDonald case by the Court of Errors and

Appeals, 90 N. J. L. 707. In the Hill case the judgment of the Supreme Court of New Jersey (91 N. J. L. 454) was affirmed by the Court of Errors and Appeals, 92 N. J. L. 514.

The statute under consideration is an act approved April 9, 1914 (P. L. 1914, p. 267), being an amendment to an act approved April 20, 1909 (P. L. 1909, p. 325), for taxing the transfer of property of resident and non-resident decedents by devise, bequest, descent, etc., in certain cases. The 1909 act is found in 4 Comp. Stats. N. J., p. 5301, *et seq.*, the amendment in 1 Supp. Comp. Stats. N. J., pp. 1538–1542. The act of 1909, in its first section, imposed a tax upon the transfer of any property, real and personal, of the value of $500 or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations, including the following cases:

"*First.* When the transfer is by will or by the intestate laws of this State from any person dying seized or possessed of the property while a resident of the State.

"*Second.* When the transfer is by will or intestate law, of property within the State, and the decedent was a non-resident of the State at the time of his death."

The taxes thus imposed were at the rate of 5 per cent. upon the clear market value of the property, with exemptions not necessary to be specified, and were payable to the treasurer for the use of the State of New Jersey.

And by § 12 it was provided that upon the transfer of property in that State of a non-resident decedent, if all or any part of the estate, wherever situated, passed to persons or corporations who would have been taxable under the act if the decedent had been a resident of the State, such property located within the State was made subject to a tax bearing the same ratio to the entire tax which the estate of such decedent would have been subject to under the act if the non-resident decedent had been a resident of the State, as the property located in the State bore to the

entire estate of such non-resident decedent wherever situated.

The act, having first been amended by an act approved March 26, 1914 (P. L. 1914, p. 91), not necessary to be recited, was again amended by the act approved April 9, 1914, which is now under consideration (P. L. 1914, p. 267; 1 Supp. Comp. Stats. N. J., pp. 1538–1542). Sections 1 and 12 were amended, the former by confining the tax on the transfer of property within the State of non-resident decedents to real estate, tangible personal property, and shares of stock of New Jersey corporations and of national banks located within the State; and by modifying the former rate of 5 per centum upon the clear market value of the property passing, which was subject to exemptions in favor of churches and other charitable institutions, and of parents, children, and other lineal descendants, etc., by making 5 per centum the applicable rate but subject to numerous exceptions, and in the excepted cases imposing different rates, dependent upon the relationship of the beneficiary to the deceased and the amount of the property transferred. Thus, "Property transferred to any child or children, husband or wife, of a decedent, or to the issue of any child or children of a decedent, shall be taxed at the rate of one per centum on any amount in excess of five thousand dollars, up to fifty thousand dollars; one and one-half per centum on any amount in excess *to* [of] fifty thousand dollars, up to one hundred and fifty thousand dollars; two per centum on any amount in excess of one hundred and fifty thousand dollars, up to two hundred and fifty thousand dollars; and three per centum on any amount in excess of two hundred and fifty thousand dollars."

The modified formula for computing the assessment upon the transfer of the estate of a non-resident decedent, prescribed in § 12 as amended by the act under consideration, is as follows:

"A tax shall be assessed on the transfer of property made

subject to tax as aforesaid, in this State of a nonresident decedent if all or any part of the estate of such decedent, wherever situated, shall pass to persons or corporations taxable under this act, which tax shall bear the same ratio to the entire tax which the said estate would have been subject to under this act if such nonresident decedent had been a resident of this State, and all his property, real and personal, had been located within this State, as such taxable property within this State bears to the entire estate, wherever situated; *provided*, that nothing in this clause contained shall apply to a specific bequest or devise of any property in this State."

An amendatory act, approved April 23, 1915 (P. L. 1915, p. 745; 1 Supp. Comp. Stats. N. J., p. 1542), repeated the provision last quoted, and made no change in the act pertinent to the questions here presented.

It is this method of assessment in the case of non-resident decedents which is the subject-matter in controversy.

James McDonald died January 13, 1915, owning stock in the Standard Oil Company, a New Jersey corporation, valued at $1,114,965, leaving an entire estate of $3,969,333.25, which included some real estate in the State of Idaho. Of the entire estate, $270,813.17 went to pay debts and expenses of administration. Mr. McDonald was a citizen of the United States and a resident of the District of Columbia, and left a will and a codicil which were admitted to probate by the Supreme Court of that District. The executors are Lawrence Maxwell, a citizen of Ohio, and the Fulton Trust Company, a New York corporation. The principal beneficiaries under the will are citizens and residents of States of the United States other than the State of New Jersey. Under the will the wife takes by specific legacies; the other beneficiaries are specific and general legatees not related to the deceased and a son and two grandchildren, who take the residuary estate.

James J. Hill died May 29, 1916, intestate, a resident

and citizen of the State of Minnesota, leaving a widow and nine children. Under the laws of Minnesota, the widow inherited one-third of the real estate and personal property, and each of the children two-twenty-sevenths thereof. The entire estate descending amounted to $53,814,762, which included real estate located outside of New Jersey, and principally in Minnesota and New York, valued at $1,885,120. The only property the transfer of which was subject to taxation in New Jersey was stock in the Northern Securities Company, a New Jersey corporation, valued at $2,317,564.68. The debts and administration expenses amounted to $757,571.20.

The amount of the assessment in the McDonald case was $29,071.68. In the Hill case the tax assessed amounted to $67,018.43. Following the statute, the tax was first ascertained on the entire estate as if it were the estate of a resident of the State of New Jersey, with all the decedent's property both real and personal located there; the tax was then apportioned and assessed in the proportion that the taxable New Jersey estate bore to the entire estate.

The thing complained of is, that applying the apportionment formula fixed by the statute, in the cases under review, results in a greater tax on the transfer of property of the estates subject to the jurisdiction of New Jersey than would be assessed for the transfer of an equal amount, in a similar manner, of property of a decedent who died a resident of New Jersey. The cause of this inequality is said to arise because of imposing the graduated tax, provided by the statute, upon estates so large as these. If a resident, in the case of a wife or children, the first $5,000 of property is exempt, the next $45,000 is taxed at the rate of 1%, the next $100,000 at the rate of 1½%, the next $100,000 at the rate of 2%, and the remainder at the rate of 3%. The contention is, that applying the apportionment rule provided in the case of non-resident estates, a larger amount of tax is assessed.

The correctness of the figures deduced from the application of the statute as made by the counsel for plaintiffs in error is contested, but in our view the differences are unimportant unless the State is bound to apply the same rule to the transmission of both classes of estates.

Counsel for plaintiffs in error sum up their objections to the statute, based on the Federal Constitution, as follows:

(1) It taxes the estates of non-residents more than those of residents and therefore gives to residents privileges and immunities denied to non-residents.

(2) It provides for a tax which bears unequally and therefore is not imposed upon a uniform rule and it therefore denies to non-residents the equal protection of the laws.

(3) It taxes the transfer of a non-resident's property over which the State of New Jersey has no jurisdiction while it expressly omits like property of residents, that is, real estate without the State, and thereby deprives the non-resident of his property without due process of law.

Before taking up these objections it is necessary to briefly consider the nature of the tax. In *Carr* v. *Edwards*, 84 N. J. L. 667, it was held by the New Jersey Court of Errors and Appeals to be a tax upon the special right, the creation of the statute, of an executor or administrator of a non-resident decedent to succeed to property having its situs in New Jersey. Of § 12, as it stood in the original act of 1909, the court said: "That section contains nothing to indicate that it is not the succession of the New Jersey representative that is meant to be taxed. It is true that the tax is not necessarily five per cent. upon the whole New Jersey succession. The amount depends on the ratio of the New Jersey property to the entire estate wherever situated. This, however, merely affords a measure of the tax imposed; the tax is still by the very words of the section imposed upon the property located within this state. The reason for adopting this provision was to make sure that the rate of taxation in case of non-resident decedents

should equal but not exceed the rate imposed in the case of resident decedents. . . .

"In the case of the estates of non-resident decedents, it is open for the law of the domicile to provide, as testators sometimes do, that such taxes shall be a general charge against the estate. Our legislature must be assumed to have had in mind its lack of jurisdiction over legacies under a non-resident's will, and in order to protect the New Jersey executor, administrator or trustee who paid the tax, authorized its deduction from 'property for distribution.' This phrase suffices to reach not only a distributive share of a resident's estate in case of intestacy, but the whole of the New Jersey property of a non-resident when turned over to the executor or administrator at the domicile of the decedent. The provision for both cases—legacies and property for distribution—demonstrates that the legislature did not mean to provide, as counsel contends, for a legacy duty only."

This language correctly characterizes the nature and effect of the tax as imposed under the amendment of 1914; but that act, under which the present cases arise, instead of reaching "the whole of the New Jersey property of a non-resident when turned over to the executor or administrator at the domicile of the decedent," now confines the transfer tax upon the property of non-resident decedents to real estate and tangible personal property within the State, the stock of New Jersey corporations, and the stock of national banks located within the State.

The tax is, then, one upon the transfer of property in New Jersey, to be paid upon turning it over to the administrator or executor at the domicile of the decedent. That transfers of this nature are within the taxing power of the State, and that taxes may be assessed upon such rights owing their existence to local laws, and to them alone, is not disputed. The right to inherit property, or to receive it under testamentary disposition, has been so frequently

held to be the creation of stautory law, that it is quite unnecessary to cite the decisions which have maintained the principle. While this is confessedly true, the assessment of such taxes is, of course, subject to applicable limitations of the state and federal constitutions; it is with the latter class only that this court has to do.

(1) Taking up, then, the objections raised under the Federal Constitution, it is said that the law (*a*) denies to citizens of other States the privileges and immunities granted to citizens of the State of New Jersey, in violation of par. 1, § 2, Art. IV, of the Federal Constitution, which reads: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States;" (*b*) abridges the privileges and immunities of plaintiffs in error, the deceased persons whom they represent, and those taking by will or intestacy under them, as citizens of the United States, in contravention of § 1 of the Fourteenth Amendment.

The provision quoted from Art. IV of the Constitution was intended to prevent discrimination by the several States against citizens of other States in respect of the fundamental privileges of citizenship. As is said by Judge Cooley in his Constitutional Limitations, 7th ed., p. 569: "It appears to be conceded that the Constitution secures in each State to the citizens of all other States the right to remove to, and carry on business therein; the right by the usual modes to acquire and hold property, and to protect and defend the same in the law; the right to the usual remedies for the collection of debts and the enforcement of other personal rights; and the right to be exempt, in property and person, from taxes or burdens which the property, or persons, of citizens of the same State are not subject to." *Paul* v. *Virginia*, 8 Wall. 168, 180; *Ward* v. *Maryland*, 12 Wall. 418, 430.

The Fourteenth Amendment recognized a distinction between citizenship of the United States and citizenship

of one of the States. It provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." What those privileges and immunities were was under consideration in *Slaughter-House Cases*, 16 Wall. 36, 72–79, where it was shown (pp. 77–78) that it was not the purpose of this Amendment, by the declaration that no State should make or enforce any law which should abridge the privileges and immunities of citizens of the United States, to transfer from the States to the Federal Government the security and protection of those civil rights that inhere in state citizenship; and (p. 79) that the privileges and immunities of citizens of the United States thereby placed beyond abridgment by the States were those which owe their existence to the Federal Government, its national character, its constitution, or its laws. To the same effect is *Duncan* v. *Missouri*, 152 U. S. 377, 382.

We are unable to discover in the statute before us, which regulates and taxes the right to succeed to property in New Jersey upon the death of a non-resident owner, any infringement of the rights of citizenship either of the States or of the United States, secured by either of the consitututional provisions referred to. We have held that the protection that they afford to rights inherent in citizenship are not infringed by the taxation of the transfer of property within the jurisdiction of a State passing by will or intestacy where the decedent was a non-resident of the taxing State, although the entire succession was taxed in the State where he resided. *Blackstone* v. *Miller*, 188 U. S. 189, 207.

Upon this point it is unnecessary to decide whether the case might not be rested on a much narrower ground. The alleged discrimination, here complained of, so far as privileges and immunities of citizenship are concerned, is not strictly applicable to this statute because the difference in the method of taxation rests upon residence

and not upon citizenship. *La Tourette* v. *McMaster*, 248 U. S. 465.

(2) It is next contended that the effect of including the property beyond the jurisdiction of the State in measuring the tax, amounts to a deprivation of property without due process of law because it in effect taxes property beyond the jurisdiction of the State.

It is not to be disputed that, consistently with the Federal Constitution, a State may not tax property beyond its territorial jurisdiction, but the subject-matter here regulated is a privilege to succeed to property which is within the jurisdiction of the State. When the State levies taxes within its authority, property not in itself taxable by the State may be used as a measure of the tax imposed. This principle has been frequently declared by decisions of this court. The previous cases were reviewed and the doctrine applied in *Kansas City, Fort Scott & Memphis Ry. Co.* v. *Kansas*, 240 U. S. 227, 232. After deciding that the privilege tax, there involved, did not impose a burden upon interstate commerce, this court held that it was not in substance and effect a tax upon property beyond the State's jurisdiction, although a large amount of the property, which was referred to as a measure of the assessment, was situated outside of the State. In the present case the State imposes a privilege tax, clearly within its authority, and it has adopted as a measure of that tax the proportion which the specified local property bears to the entire estate of the decedent. That it may do so within limitations which do not really make the tax one upon property beyond its jurisdiction, the decisions to which we have referred clearly establish. The transfer of certain property within the State is taxed by a rule which considers the entire estate in arriving at the amount of the tax. It is in no just sense a tax upon the foreign property, real or personal. It is only in instances where the State exceeds its authority in imposing a tax upon a subject-matter within its

jurisdiction in such a way as to really amount to taxing that which is beyond its authority, that such exercise of power by the State is held void. In cases of that character the attempted taxation must fail. *Looney* v. *Crane Co.*, 245 U. S. 178; *International Paper Co.* v. *Massachusetts*, 246 U. S. 135. To say that to apply a different rule regulating succession to resident and non-resident decedents is to levy a tax upon foreign estates, is to distort the statute from its purpose to tax the privilege, which the statute has created, into a property tax, and is unwarranted by any purpose or effect of the enactment, as we view it.

(3) It is further contended that the tax bears so unequally upon non-residents as to deny to them the equal protection of the laws.

The subject of taxes of this character was given full consideration by this court in *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, in which case a graded legacy and inheritance tax law of the State of Illinois was sustained. The statute exempted all estates valued at less than $20,000, if passing to near relations, or at less than $500 if passing to those more remote, made the rate of tax increasingly greater as the inheritances increased, and assessed it differently according to the relationship of the beneficiary to the testator or intestate. The statute was attacked as void under the equal protection clause of the Fourteenth Amendment, but was held to be valid. Of this class of taxes the court said (p. 288): "They [inheritance taxes] are based upon two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the States may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power

by the provisions of the respective state constitutions requiring uniformity and equality of taxation."

And upon examining (pp. 296, 297) the classification upon which the provisions of the Illinois statute were based, the court found there was no denial of the equal protection of the laws either in discriminating between those lineally and those collaterally related to decedent, and those standing as strangers to the blood, or in increasing the proportionate burden of the tax progressively as the amount of the benefit increased.

Equal protection of the laws requires equal operation of the laws upon all persons in like circumstances. Under the statute, in the present case, the graduated taxes are levied equally upon all interests passing from non-resident testators or intestates. The tax is not upon property, but upon the privilege of succession, which the State may grant or withhold. It may deny it to some and give it to others. The State is dealing in this instance not with the transfer of the entire estate, but only with certain classes of property that are subject to the jurisdiction of the State. It must find some rule which will adequately deal with this situation. It has adopted that of the proportion of the local estate in certain property to the entire estate of the decedent. In making classification, which has been uniformly held to be within the power of the State, inequalities necessarily arise, for some classes are reached, and others omitted, but this has never been held to render such statutes unconstitutional. *Beers* v. *Glynn*, 211 U. S. 477. This principle has been recognized in a series of cases in this court. *Board of Education* v. *Illinois*, 203 U. S. 553; *Campbell* v. *California*, 200 U. S. 87; *Keeney* v. *New York*, 222 U. S. 525. It has been uniformly held that the Fourteenth Amendment does not deprive the States of the right to determine the limitations and restrictions upon the right to inherit property, but "at the most can only be held to restrain such an exercise of power as would

exclude the conception of judgment and discretion, and which would be so obviously arbitrary and unreasonable as to be beyond the pale of governmental authority." *Campbell* v. *California*, 200 U. S. 95. In upholding the validity of a graduated tax upon the transfer of personal property, to take effect upon the grantor's death, we said in *Keeney* v. *New York, supra*, p. 535: "The validity of the tax must be determined by the laws of New York. The Fourteenth Amendment does not diminish the taxing power of the State, but only requires that in its exercise the citizen must be afforded an opportunity to be heard on all questions of liability and value, and shall not, by arbitrary and discriminatory provisions, be denied equal protection. It does not deprive the State of the power to select the subjects of taxation. But it does not follow that because it can tax any transfer (*Hatch* v. *Reardon*, 204 U. S. 152, 159), that it must tax all transfers, or that all must be treated alike."

In order to invalidate this tax it must be held that the difference in the manner of assessing transmission of property by testators or intestates, as between resident and non-resident decedents, is so wholly arbitrary and unreasonable as to be beyond the legitimate authority of the State. We are not prepared so to declare. The resident testator or intestate stands in a different relation to the State than does the non-resident. The resident's property is usually within the ready control of the State, and easily open to inspection and discovery for taxation purposes, by means quite different from those afforded in cases of local holdings of non-resident testators or intestates. As to the resident, his entire intangible, and usually most of his tangible property, pay tribute to the State when transferred by will or intestacy; the transfer of the non-resident's estate is taxed only so far as his estate is located within the jurisdiction and only so far as it comes within the description of "real property within this State, or of goods, wares,

and merchandise within this State, or of shares of stock of corporations of this State, or of national banking associations located in this State." Simple contract debts owing by New Jersey debtors to non-residents and some other kinds of property of non-residents are exempt, although it is settled that, for the purpose of founding administration, simple contract debts are assets at the domicile of the debtor; *Wyman* v. *Halstead*, 109 U. S. 654, 656; and that the State of the debtor's domicile may impose a succession tax; *Blackstone* v. *Miller*, 188 U. S. 189, 205; *Baker* v. *Baker, Eccles & Co.*, 242 U. S. 394, 401.

The question of equal protection must be decided as between resident and non-resident decedents as classes, rather than by the incidence of the tax upon the particular estates whose representatives are here complaining. Absolute equality is impracticable in taxation, and is not required by the equal protection clause. And inequalities that result not from hostile discrimination, but occasionally and incidentally in the application of a system that is not arbitrary in its classification, are not sufficient to defeat the law.

In our opinion, there are substantial differences which within the rules settled by this court permit the classification which has been accomplished by this statute. *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, 367, and cases cited.

Finding no error in the judgments of the Court of Errors and Appeals of the State of New Jersey, the same are

Affirmed.

MR. JUSTICE HOLMES dissenting.

Many things that a legislature may do if it does them with no ulterior purpose, it cannot do as a means to reach what is beyond its constitutional power. That I understand to be the principle of *Western Union Telegraph Co.* v. *Kansas; Pullman Company* v. *Kansas*, and other cases

in 216 U. S. *Western Union Telegraph Co.* v. *Foster*, 247 U. S. 105, 114. New Jersey cannot tax the property of Hill or McDonald outside the State and cannot use her power over property within it to accomplish by indirection what she cannot do directly. It seems to me that that is what she is trying to do and therefore that the judgments of the Court of Errors and Appeals should be reversed.

It seems to me that when property outside the State is taken into account for the purpose of increasing the tax upon property within it, the property outside is taxed in effect, no matter what form of words may be used. It appears to me that this cannot be done, even if it should be done in such a way as to secure equality between residents in New Jersey and those in other States.

New Jersey could not deny to residents in other States the right to take legacies which it granted to its own citizens, and therefore its power to prohibit all legacies cannot be invoked in aid of a principle that affects the foreign residents alone. In *Kansas City, Fort Scott & Memphis Ry. Co.* v. *Kansas*, 240 U. S. 227, 235, the State could have refused incorporation altogether and therefore could impose the carefully limited condition that was upheld.

THE CHIEF JUSTICE, MR. JUSTICE VANDEVANTER and MR. JUSTICE MCREYNOLDS concur in the opinion that I express.

CARTAS *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 122. Motion to dismiss or affirm submitted October 13, 1919.—Decided November 10, 1919.

To review a judgment of the Court of Claims dismissing a petition for want of jurisdiction upon the ground that the facts alleged have no tendency to establish a contract with the United States, a finding of facts is not essential. P. 546.

Paragraph 13 of Article 8 of the Articles for the Government of the Navy (Rev. Stats., § 1624), which imposes a penalty on any person in the Navy who receives, etc., on board his vessel any goods or merchandise, for freight, sale or traffic, except gold, silver or jewels, for freight or safe-keeping; or who demands or receives any compensation for the receipt or transportation of any other article than gold, silver or jewels, without authority from the President or the Secretary of the Navy; recognizes and limits the preëxisting discretion of commanding officers to receive property on board for the protection of private rights; and neither under this statute nor under § 1020 of the Navy Regulations, by which the compensation for the permitted service is to be applied to the benefit of officers and men, does such a deposit of gold give rise to any contract with the United States. P. 547.

48 Ct. Clms. 161, affirmed.

THE case is stated in the opinion.

The Solicitor General, Mr. Assistant Attorney General Davis and *Mr. George M. Anderson*, for the United States, in support of the motion.

Mr. William R. Andrews and *Mr. George H. Lamar*, for appellant, in opposition to the motion. *Mr. Thomas M. Henry* was on the brief.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

This suit was brought to recover from the United States $51,000 in American gold coin with interest from 1869,

based upon a contract alleged to have been made in that year by the United States as the result of a deposit of the principal sum claimed on a war vessel of the United States. The court, concluding that the facts alleged had no substantial tendency to establish a contract liability on the part of the United States either express or implied, dismissed the suit for want of jurisdiction, as its power to adjudge against the United States extended only to obligations of that character. A written opinion was filed, but no finding of facts was made. The United States suggests that the cause be remanded for such finding, but if that course were pursued only the relevant facts could be embraced in the finding and, as all such facts were admitted by the court below, the case is open to our consideration and we think there is no necessity for remanding it.

In the petition which was filed in 1902 by Ricardo Cartas, now the appellant, it was alleged that about 33 years before, in January, 1869, Carlos de Castillos deposited on board the American flagship "Contoocook," then in Havana Harbor, Spanish gold the equivalent of $51,000 in American gold coin. It was alleged that the deposit was evidenced by a receipt given by the American consul at Havana and that the petitioner was the grandson of Castillos and was vested by inheritance with all his rights growing out of the deposit. It was further alleged that the deposit was a contract between the depositor and the United States binding the United States to preserve and return the deposit when demanded, and that it had never been returned; indeed, that no demand for its return had been made during the time which elapsed either by Castillos or by anyone authorized to represent him or his interest. Further, it was averred that, although it appeared from the files of the Navy Department that a few months after the deposit was made, that is in April, 1869, it had been returned by the officer commanding the "Contoo-

cook" to one Arredondo, acting as the agent of Castillos and who was believed by such commanding officer to be fully authorized to receive it, nevertheless the contract obligation on the part of the United States yet existed because said Arredondo was not the agent of Castillos and the United States remained bound to return the said deposit and was not relieved therefrom by the payment made by such officer, although in good faith, to a person not entitled to receive it.

Admitting the facts thus alleged, it is indisputable that the only question for decision is the making of the alleged contract with the United States. Indeed, it is to that question and to that question alone that the errors assigned and the contentions advanced to sustain them relate. They all are based upon a power in the commanding officer to contract on behalf of the United States asserted to be conferred by Paragraph 13 of Article 8 of the "Articles for the Government of the Navy" (Rev. Stats., § 1624), as elucidated by § 1020 of the Navy Regulations. A brief reference to the matters thus relied upon will bring us to the end of the controversy.

The first, the statutory provision, imposes a penalty upon any person in the Navy who—"takes, receives, or permits to be received, on board the vessel to which he is attached, any goods or merchandise, for freight, sale, or traffic, except gold, silver, or jewels, for freight or safe-keeping; or demands or receives any compensation for the receipt or transportation of any other article than gold, silver, or jewels, without authority from the President or the Secretary of the Navy."

The wide discretion possessed by the commanding officer of a naval vessel concerning the receipt on board, for the protection of private rights, of gold, silver or jewels, which it was the obvious purpose of this statute not to modify, since the power as to such articles was excepted from the additional limitation which the statute imposed

as to other articles, affords no ground for the implication that contract obligations would automatically arise as against the United States from the mere exercise by the officer of his discretion. A consideration of the nature of the objects which the provision excepted and the complex and varied character of the conditions which might call for the exercise of the discretion add cogency to this view and at once suggest the incongruity and conflict which must result from the contrary contention.

And this view serves also to dispose of the contention based upon § 1020 of the Navy Regulations which but comprehensively recognizes that compensation due for services rendered as the result of the exercise of the discretion of the officer, to permit the articles in question to be taken on board, should be applied, not for the benefit of the United States in virtue of any contract relation with the subject, but for the benefit of the officers and men designated in the proportions stated in the regulation. Indeed, the coördination which the regulation thus manifests between the burden resulting from the exercise of the discretion to receive on board and the distribution of the emoluments arising from its exertion serves to point out the entire unison between the expression of legislative power and the administrative regulation and to make clear the disregard of both which would inevitably result from sustaining the contention as to contract obligation on the part of the United States now relied upon.

Affirmed.

UNITED STATES ON THE RELATION OF ALASKA SMOKELESS COAL COMPANY *v.* LANE, SECRETARY OF THE INTERIOR, ET AL.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 36. Argued October 14, 1919.—Decided November 10, 1919.

The Act of April 28, 1904, § 1, c. 1772, 33 Stat. 525, provided that the locator of unsurveyed coal land in Alaska "shall have opened or improved a coal mine;" upon an application for patent the Secretary of the Interior construed this as requiring that the work done evince a purpose to open or improve a producing mine; and, examining the undisputed facts as to the work relied on, which consisted of more or less superficial excavations exposing coal, found that it was done for prospecting purposes and that it did not satisfy the statute. *Held*, not arbitrary even if erroneous; and not subject to revision by mandamus. P. 552.

Held, further, that the Secretary's discretion in the matter was not foreclosed by rulings in earlier cases, as to what constitutes the opening or improvement of a mine, said to have been relied on in the making of the locations, but the effect of which is found not to be inconsistent with the decision complained of. P. 553.

46 App. D. C. 443, affirmed.

THE case is stated in the opinion.

Mr. Dean Burkheimer, with whom *Mr. Charles E. Shepard*, *Mr. James R. Caton*, *Mr. Stanton C. Peelle* and *Mr. C. F. R. Ogilby* were on the brief, for plaintiff in error.

Mr. Assistant Attorney General Nebeker, with whom *The Solicitor General* was on the brief, for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Petition for mandamus to require the Secretary of the Interior and the Commissioner of the General Land Office

to approve and pass to patent the application of the petitioner for certain coal claims, or to show cause why they have not done so.

Respondents replied that they are constituted by law the sole agents of the Government in the administration and disposal of the public lands by and through the means appointed by Congress and have exclusive jurisdiction to determine the validity of all claims or applications to enter or acquire any part of them, and that the discharge of that duty involves judgment and discretion.

And further replied that petitioner sought to acquire title to the coal claims under the Act of April 28, 1904, c. 1772, 33 Stat. 525, and the Act of May 28, 1908, c. 211, 35 Stat. 424, by virtue of the locations set out in the petition. That the locations came on to be heard and that they, respondents, after considering all of the evidence and applying the law thereto, found and determined that the locations involved were invalid, the locators not having opened or improved any mine or mines of coal on any of the tracts of land in controversy as required by the cited statutes, and that petitioner was not entitled to purchase the same, and thereupon respondents in the exercise of their discretion and judgment rejected the application.

Hence they prayed that the rule against them be discharged and the petition dismissed.

Petitioner demurred to the reply on the ground that it did not set forth any substantial or legal defense. The demurrer was overruled and petitioner electing to stand upon it, the rule to show cause was discharged and the petition dismissed. The judgment was affirmed by the Court of Appeals.

The question in the case, therefore, is direct, that is, the power of the Land Office under the cited statutes and the facts recited in the petition. This power, we may say at the outset, necessarily is something more than ministerial, the mere yielding to and registry of any demand,

and yet, on the other hand, not arbitrary, without statutory direction or regulation by settled rules and principles. In other words, the Land Office is like any other tribunal—its institution and purpose defining and measuring its power, the determining elements being those of fact and law, upon which necessarily judgment must be passed.

What are the elements of fact and of law in the present case? As set forth in the petition they are these:

Sections 2347 to 2352 of the Revised Statutes provide for the entry of vacant coal lands, 160 acres to an individual, 320 acres to an association, who have *opened and improved*, or shall "*open and improve*, [italics ours] any coal mine or mines upon the public lands" (§ 2348).

These sections were extended to Alaska by an act passed June 6, 1900, [c. 796, 31 Stat. 658] and the latter act was amended by the Act of April 28, 1904, *supra*, § 1 of which provides "That any person or association of persons qualified to make entry under the coal-land laws of the United States, who shall have *opened or improved* [italics ours] a coal mine or coal mines on any of the unsurveyed public lands of the United States in the district of Alaska, may locate the lands upon which such mine or mines are situated. . . . "

Section 2 of the act provides for the application for and issue of patent.

The Act of May 28, 1908, provides for the consolidation of claims and their inclusion in a single claim. It is otherwise of no importance.

It will be observed that the only substantial difference between the sections of the Revised Statutes and the act extending them to Alaska is that by the former the right of location is granted to one or those "who have opened *and* improved" a mine or mines, and by the latter the grant is to one or those "who shall have opened *or* improved" a mine or mines.

Petitioner in great volume asserts locations under the

Act of April 28, 1904, to which locations it has succeeded. The facts concerning them are not in dispute; but whether what was done constituted an opening or improvement of mines and constrained a decision other than that given by the Land Office, is in dispute.

Eight locations were made, all of which were conveyed by the asserted locators to petitioner in March, 1909. Surveys were made of the locations, which surveys were duly examined and filed in the proper land office in Alaska; and in 1909 petitioner paid to the Treasurer of the United States ten dollars for each acre surveyed, in the aggregate $9,905.74, and made application to the then Secretary of the Interior through the local land office for a patent, tendering due proof of the locations of each applicant. Notice was posted.

April 26, 1912, at the local land office (Juneau), under the direction of the Commissioner of the General Land Office, proceedings were instituted against the application of petitioner upon the ground, among others, that neither of the claimants prior to making the locations or at any time thereafter and prior to filing notice of the locations, opened or improved any mine or mines of coal on any of the tracts of land as required by the Act of April 28, 1904.

Proofs were taken upon the charges and the register and receiver sustained them and decided and recommended that the application for a patent be rejected.

Upon an appeal to the Commissioner the decision of the local officers was approved after a circumstantial review of the case; and again upon appeal from the Commissioner's decision, by the Secretary of the Interior.

All of the officers decided that the acts of Congress contemplated as a basis of a valid location the opening and developing of a producing mine of coal and that work performed upon a claim for prospecting purposes does not fulfill the requirement. And that such was the character of the work done upon the claims in question was the de-

duction of the officers. "Shallow surface cuts and openings" the work was denominated, and not made "for the purpose of the opening or improving of a producing coal mine or mines."

The characterization, purpose and effect thus ascribed to the work of the claimants are contested and it is insisted that the amount and effect of the work done constituted an opening and improving of mines and constrained an opposite conclusion and judgment from that of the Land Office, and it is insisted, indeed, that a contrary conclusion was constrained not only by the provisions of the statutes but by previous rulings of the department, under the assurance of which the locations were made and thereby acquired the quality of vested rights to be recognized by the issue of patent as a matter of course—an irresistible right, therefore, having legal remedy in mandamus. It is hence insisted that "the respondent [Secretary of the Interior] and his said subordinates have erred, not in the facts, but in their interpretation and construction of the acts of Congress and of the law pertaining to coal mines in or under public lands of the United States in Alaska, and to the rights of location, application and patent thereof by locators and their assigns . . . and thereby exceeding his and their powers and jurisdiction."

The contention is repeated in petitioner's brief in various ways and illustrations. Cases besides are cited with the assertion that in such situation there is no room for the exercise of "discretion" but that it is the imperative duty of the Secretary to issue a patent, the right to it having become vested.

Undoubtedly there may be cases in which rights had actually accrued and nothing remained to the Secretary but their recognition, and counsel have collected and urged such as they deem in point; [1] but the present case lacks

[1] *Cudney* v. *Flannery*, 1 L. D. 165; *M. K. & T. Ry.* v. *Buck* (L. D. unreported); *Miner* v. *Mariott*, 2 L. D. 709; *Milne* v. *Ellsworth*, 3 L. D.

their essential condition. The decision of the local land officers and that of the Commissioner and Secretary disprove the assumption that counsel make that there was only an interpretation and construction of the acts of Congress. On the contrary there was a painstaking consideration and review of the evidence and a determination of its probative strength, and the deduction was that what was done was for prospecting purposes merely and did not satisfy the requirements of the acts of Congress—a purpose to open or improve a mine or mines. And necessarily there is a difference in the purposes, a difference between a mere discovery or exposition of a vein of mineral and its development. Counsel's contention confounds the difference and insists that it is established by the rulings in prior cases in the department that a mine is opened or improved by an "actual excavation of the earth, whether by open cut or tunnel, so as to expose a vein of coal, which is the coal mine." And this, it is contended, has become a principle of decision and has the insistent quality of *stare decisis*—commanding a specific conclusion, superseding by its automatism any discretionary function in the land officers.

It is not necessary to review the cases. It is enough to say that they have not the inflexibility ascribed to them. And this can be illustrated. Counsel speak of exposition of a vein by a "cut or tunnel." How deep or extensive must either be to invoke the principle? And is the principle confined to such or is it applicable whatever the kind or extent of the work—by any disturbance of the surface or without any disturbance if the vein be above the sur-

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213; *Henry W. Fuss*, 5 L. D. 167; *Oliver* v. *Thomas*, 5 L. D. 289; *Watts* v. *Forsyth*, 5 L. D. 624; *Williams* v. *Loew*, 12 L. D. 297; *James B. Weaver*, 35 L. D. 553; *Roy McDonald*, 36 L. D. 205; *Oliver* v. *Bates*, 36 L. D. 123; *Bertram C. Noble*, 43 L. D. 75; *Fisher* v. *Heirs of Rule*, 43 L. D. 217; *Siletz Indian Lands*, 42 L. D. 244; *Rough Rider and other Lode Mining Claims*, 42 L. D. 584.

face? Manifestly judgment in all cases must be exercised —judgment not only of the law but what was done under the law, and its sufficiency to avail of the grant of the law.

In *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, it was said that Congress has constituted the Land Department the administrator of the public lands and for the discharge of this duty invested it with judicial functions which are not subject to review by injunction or mandamus. This was repeated and applied in *Ness* v. *Fisher*, 223 U. S. 683.

Counsel contest the application of these cases and distinguish them from that at bar by the difference between ministerial and judicial action, and assert "that the Secretary has essentially altered the law by converting the essential terms of it, upon which our rights are based, to terms of another meaning, and that that is an arbitrary act which the courts can control and overrule." If the accusation were true the conclusion might follow; but the accusation is not true. We rest on this declaration. It would extend this opinion too much to trace through the ingenuity of counsel's reasoning in a very long brief and the citation and analysis of many cases the distinction they rely on, that is, the distinction between formal and discretionary action. Undoubtedly there is that distinction. *Lane* v. *Hoglund*, 244 U. S. 174. But where there is discretion, as we think there is in this case, even though its conclusion be disputable, it is impregnable to mandamus. *Riverside Oil Co.* v. *Hitchcock* and *Ness* v. *Fisher*, *supra*.

Judgment affirmed.

LEHIGH COAL & NAVIGATION COMPANY *v.* UNITED STATES.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 38. Argued October 14, 1919.—Decided November 10, 1919.

Under a covenant in a long lease of its railroad properties, made in 1871 by the Lehigh Coal & Navigation Company to the Central Railroad of New Jersey, a connecting carrier, the coal of the Lehigh Company was transported from its mines in Pennsylvania to New Jersey points at rates less than were charged by the Central on coal from other mines of the same region; the allowance was indicated in all tariffs (262 in number) filed by the Central in and after the year of the Hepburn Act (1906), by a note not specifying it in figures but referring to the lease and covenant; and for receiving such allowances in the years 1912–1915, the Lehigh Company was indicted for *knowingly* receiving rebates or concessions whereby the coal was transported at a less rate than that named in the tariffs, in violation of the Elkins Act as amended by the Hepburn Act (c. 3591, 34 Stat. 584). Discrimination was not charged. *Held*, that the defendant was entitled to prove that it received such allowances in the honest belief that they were sufficiently described in and justified under the tariffs, such belief having been based on advice given the defendant when the tariff description was first formulated, upon the acceptance without objection by the Interstate Commerce Commission of the numerous tariffs containing it, upon information from the carrier, in 1908, that the form was specifically approved by the Commission through its officer in charge of tariffs, and upon the fact that the Commission, in 1909, was informed through an examination of defendant's records and books of the receipt of such allowances and did not object. P. 562. *Armour Packing Co.* v. *United States*, 209 U. S. 56, distinguished.

THE case is stated in the opinion.

Mr. Henry S. Drinker, Jr., with whom *Mr. Abraham M. Beitler* and *Mr. Wm. Jay Turner* were on the briefs, for Lehigh Coal & Navigation Co.

Mr. Henry S. Mitchell, Special Assistant to the Attorney General, with whom *The Solicitor General* was on the brief, for the United States:

The alleged mistake of law was irrelevant to the question whether the statute was violated by the shipper. The same alleged mistake was held irrelevant to the question whether the statute was violated by the carrier. *Central Railroad Co.* v. *United States*, 229 Fed. Rep. 501.

The rejection of the claim of good faith concerning the footnote in the tariff, as a defense in the carrier's case, is authority for following the same course on the same facts in the case of the shipper, because the principle thus enforced against the carrier was one previously established by this court as against shippers. *Armour Packing Co.* v. *United States*, 209 U. S. 56. The *Armour Case* was followed in *Chicago, St. P., M. & O. Ry. Co.* v. *United States*, 162 Fed. Rep. 835.

The *Armour Case* and the *Chicago, St. P., M. & O. Ry. Case* arose under the Elkins Act prior to the insertion therein of the word "knowingly" by the Hepburn Act of 1906, and defendant emphasizes that, as if it had an important bearing in this case. But the prosecution in *Central Railroad Co.* v. *United States*, was based on the statute with the word "knowingly" inserted, and the Court of Appeals there held that the asserted belief that the law was complied with, by means of the footnote in the tariff, was irrelevant to the question whether the statute was violated.

The word "knowingly" in the act is evidently to be taken as consistent with established conceptions of the law. Thus it may exclude responsibility in cases of mistake of fact; for instance, a miscalculation of the freight payable, or an error as to the contents or weight of packages shipped. Or it may exclude individual liability in the case of an officer having only partial knowledge of essential facts. So too, conceivably, liability may be

excluded in the case of a shipper who made a mistake as to a tariff and erroneously thought the rate he paid was published in the tariff.

We see no reason to take the word "knowingly" in the act as referring to a knowledge of law, thus excluding responsibility where there was a mistake of law with full knowledge of the facts and of the act done, and thus overriding the established principle that knowledge of the law is presumed.

Counsel for defendant rest the argument in their brief upon the assumption that defendant misunderstood the meaning of the tariff. The sole misunderstanding which the excluded testimony tended to show would consist in supposing that the "allowances" could be justified by the footnote in the tariff and that would be a misunderstanding of the Elkins Act, not of the tariff.

The prohibition in the Elkins Act of rebates which reduce the published rate is in terms absolute. There is in the Act to Regulate Commerce as amended by the Hepburn Act of 1906 provision for allowances for transportation services rendered by a shipper. But another provision of the Act to Regulate Commerce requires that all allowances shall be specified in the tariffs, whilst the footnote in the tariff did not specify the amount of the "allowances" to the defendant. But, wholly apart from the lack of specification, these "allowances" could not be justified upon the theory that they were for transportation services, because they were in fact not for such services. In the anthracite regions the term "lateral allowance" means an allowance for transportation services rendered by a shipper. *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 247, 252. As the Court of Appeals held in *Central Railroad Co.* v. *United States*, *supra*, "nothing appears to support" the representation that these "allowances" were for transportation services. 229 Fed. Rep. 509.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The case is here on certificate, an outline of which it is necessary to give.

The Lehigh Coal & Navigation Company, herein called the Company, is a miner and shipper of anthracite coal and was indicted, convicted and fined in the District Court of New Jersey for accepting rebates and concessions from the Central Railroad of New Jersey in violation of the Elkins Act, as amended in 1906, 34 Stat. 584.

It was charged in each count of the indictment that the Central Railroad Company was an interstate carrier of coal and as such filed tariffs and schedules with the Interstate Commerce Commission showing its rates and charges from the coal fields in Pennsylvania to points in New Jersey.

During 1912, 1913, 1914 and a part of 1915, the tariffs were in force and under them the Company shipped a carload (described in the indictment) from its colliery in Pennsylvania to a specified point in New Jersey and accepted from the railroad a portion of the rate due and payable so that the coal was carried at less than the rate and the Company thus received the advantage of an illegal rebate. Discrimination was not charged.

In accordance with circumstances which are detailed at length in the certificate, among which was the fact that the Company at one time operated a railroad of its own (the Lehigh & Susquehanna), the Company decided to lease its railroad properties to the Central Railroad, a connecting carrier. Accordingly, March 31, 1871, the Company made a lease to the Railroad, the 10th covenant of which provided as follows:

". . . on coal delivered for transportation by the Company on sidings at the northern end of the Nesquehoning tunnel, the rates of transportation shall not exceed

the rates charged at the same time from Penn Haven to the same points on coal from the Lehigh region, either by the Central Railroad or by the Lehigh Valley Railroad Company."

In making the lease naturally the Company took into account the advantageous nearness of its mines to tide and sought to insure favorable rates for the coal from its collieries.

About 1878 the method of fixing rates was changed but the rate to be charged the Company was fixed at 86% of the rate charged to other mines in the Lehigh region, the reason being that there was that difference in distance. While this arrangement was in force the Company paid a net rate calculated on the basis of 86%. After 1887, the date of the first act to regulate commerce, this method of settlement was changed and the Company was charged the full tariff rate, but was rebated or credited with 14% thereof, this being done under the obligation or supposed obligation of the 10th covenant. And between 1887 and August, 1906, when the Hepburn Act went into effect, this arrangement for repayment did not appear in the tariffs filed by the Railroad with the Commission. But in August, 1906, and thereafter, the tariffs contained a footnote in the following form:

"(4) In compliance with the Tenth Covenant of the lease from the Lehigh Coal & Navigation Company under which the Central Railroad Company of New Jersey operates the Lehigh and Susquehanna Railroad, a lateral allowance is made out of herein-named rates to the Lehigh Coal and Navigation Company on all Anthracite coal originating on the latter's tracks in the Panther Creek, Nesquehoning, and Hacklebarnie, Districts mined and shipped by it, when coming via the Hauto, Nesquehoning, and Mauch Chunk gateways."

All of the tariffs of the Railroad filed with the Commission after 1906 (262 in number) contained the footnote.

The allowance was 19.18 cents per ton and this was credited in the monthly settlement of the Company's account with the Railroad, the credit being the point of the Government's attack.

"The verdict covers 27 shipments of coal in prepared sizes from Nesquehoning colliery for reshipment at Elizabethport. The foregoing facts were either proved or stipulated, and it appeared also without dispute that during the years in question the Company's officers were familiar with the contents of the Central Railroad's tariffs, and knew that the allowance was being made and accepted. One of the Company's defenses was that it had not 'knowingly' accepted a rebate within the meaning of the Act—its contention being, that the allowance had been accepted in good faith, in the honest belief that the payment was justified by the 10th covenant, and also in the honest belief that the allowance was properly and legally noted and provided for in the filed and published tariffs."

The Company offered evidence that would support the following findings:

(1) At the time the note was made, the Company was informed of it, but was advised that the note had been made part of the tariff in full compliance with the Act of 1906, and that being so the payment and receipt of the allowance would comply with the tariff and the law and the officers of the Company relied on this judgment.

(2) Between 1906 and the date of the indictment 262 tariffs, all containing the note, had been filed and accepted by the Commission.

(3) In 1908 the Company had been informed by the Railroad that the Commission (acting through one of the Commission's important officers who was in charge of the tariffs) had specifically approved the form of the tariff containing the note, in spite of the fact that the amount of the allowance had not been specified therein, the Commission at the time having the question under consideration.

By reason of such information the Company honestly believed that the receipt of the allowance was not in violation of the tariff or the act, but was in compliance therewith.

(4) The Company's books, records and accounts were examined by the Commission's investigators in 1909, and the Commission was thereby informed that the Company had received and was receiving the allowance, but the Commission did not object either to the form or the substance of the practice.

"The Company's evidence concerning good faith was received under the Government's objection, and the Government offered evidence in contradiction thereof. At the close of the trial the court struck out all the evidence on this subject from the record, and refused to submit the question of good faith to the jury, holding that the Company's honest belief that the allowance was permitted by the tariffs and the footnote thereto could not affect the issue, for the reason that the Company knew the contents of the tariffs, and knew also that the allowance was actually made and received."

The certificate asks the following questions:

"1. In the criminal prosecution of a shipper for knowingly accepting transportation at less than the duly established rate by receiving an allowance that was referred to in the tariff but was not specified in figures therein, has the defendant a right to offer evidence that the allowance was received under the honest belief that it was lawfully established by the tariff, and under the honest belief that in receiving it he was not disregarding what he believed to be the provisions of the tariff but was complying therewith?

"2. Upon the foregoing facts, and in view of the kind and amount of evidence offered upon the subject of good faith, did the district court err in the present case by refusing to submit the question to the jury? "

The questions asked depend upon the construction of the Elkins Act, as enacted in 1903 (32 Stat. 847) the relevant

part of which is as follows: " . . . It shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereto whereby any such property shall *by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier* [italics ours] . . ." And under an amendment in 1906 (34 Stat. 584) an offender, "whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebate, concession, or discrimination shall be deemed guilty of a misdemeanor."

The way to a correct construction of the act was to an extent cleared by the case of *Armour Packing Co.* v. *United States*, 209 U. S. 56. Its evolution was there detailed. It was said that carrier and shipper are charged with an equal responsibility and liability and that the act "proceeded upon broad lines" to accomplish this equality, and "that the only rate charged to any shipper for the same service under the same conditions should be the one established, published and posted as required by law." And this was declared in various ways to be the test of obligation and liability and the "form by which or the motive for which" its evasion or disregard is accomplished is not of modifying or determining consideration. It was in effect decided that the purpose of the statute took emphasis and meaning from the use of the word "device," and "device" was defined to be "anything which is a plan or contrivance" and is "disassociated" from qualification and "need not be necessarily fraudulent," and by it the act sought "to reach all means and methods by which the unlawful preference of rebate, concession or discrimination is offered, granted, given or received."

It is in effect the contention of the Government that the

language of the case exhausts definition and excludes the supposition of the questions of the Circuit Court of Appeals. We are unable to concur. The language of the case is easily explained by the question that was presented for decision. The Armour Packing Company contended that the act was directed only at fraudulent conduct, the obtaining of a rebate by some dishonest or underhand method, concession or discrimination. The language of the court was addressed to this contention and its selection and adequacy are manifest.

No such contention is made in the case at bar and there are other distinguishing elements. It will be observed that by the statute and the decision the test of equality is the tariff rate. It was said in the opinion that it is "the purpose of the act to punish those who give or receive transportation, in the sense of actual carriage, at a concession from the published rates" (*New York Central R. R. Co.* v. *United States*, 212 U. S. 500, 505). And such was the offense of the Armour Packing Company. There was no evasion of the tariff rate in the case at bar. The filed tariff indicated the existence and obligation of the 10th covenant of the lease from the Company to the Railroad, that is, the fact of the allowance was declared, though it did not have specification in figures. The tariff, of course, would have been more definite and complete with such specification, but its sufficiency was certainly believed in, for between 1906 and the date of the indictment it had 262 repetitions. The Company was given besides the assurance that it had the sanction of the Interstate Commerce Commission.

There was no attempt at deception. The Commission knew by examination of the Company's books of the allowance and the amount of the allowance. Such, then, is the situation, and distinguishes the case from the *Armour Packing Company Case*. There there was an omission to comply with the statute and the omission was attempted to

be justified by honesty of motive and purpose; here there was compliance or attempted compliance with the statute—a tariff filed—and if a question could be raised upon its legal sufficiency the belief of the Company in its legality was supported by high authority and those circumstances can bring into action and exculpating effect the provision of the statute which requires the acceptance of a rebate to be "knowingly" done to incur the guilt of a misdemeanor. This conclusion gives no detrimental example against the efficacy of the law.

We think this comment and conclusion enough to dispose of the questions asked and that there is no necessity to review the cases cited by the Company or the Government.

Some of the contentions of the Government we may notice. It is contended that the "lateral allowance" provided for in the 10th covenant and footnote to the tariff was not for transportation services and besides that there was no testimony whatsoever that the meaning of any provision of the tariff was misunderstood. The mistake, if any, it is hence insisted, was a mistake of law, not of fact. Two deductions are hence made by the Government: (1) That the allowances were not made for transportation services; (2) mistake of law is irrelevant to the question of the guilt or innocence of the Company.

To the first we may reply it is not involved as an element in the question asked of this court and if it have any justification, as to which we express no opinion, it no doubt will be considered by the Circuit Court of Appeals upon the return of the case. The other expresses a refinement. Indeed, the contention of the Government is somewhat elusive and we are not sure that we exactly estimate it. It is said "The sole misunderstanding which the excluded testimony tended to show would consist in supposing that the 'allowances' could be justified by the footnote in the tariff and that, as we have seen, would be a

misunderstanding of the Elkins Act, not of the tariff." We are unable to concur. There was no misunderstanding of the Elkins Act or what it required. The misunderstanding was induced by practice and the opinion of those in authority that the act was complied with and the word "knowingly" therefore, as we have already indicated, must be considered and given exculpating effect if error there was.

We therefore answer the first question in the affirmative, but as explained by reference to the certificate of facts above. We do not think it is necessary to answer the second question.

MR. JUSTICE MCREYNOLDS took no part in the decision.

PENNSYLVANIA RAILROAD COMPANY *v.* PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA ET AL.

ERROR TO THE SUPERIOR COURT OF THE STATE OF PENNSYLVANIA.

No. 53. Argued October 24, 1919.—Decided November 10, 1919.

A writ of error will lie to a judgment of the Superior Court of Pennsylvania upholding a law of the State against an objection based on the Federal Constitution, if the Supreme Court of the State refuses to allow an appeal. P. 568.

Want of power in a state commission to consider the constitutionality of a law which it seeks to enforce can not limit the right of a party affected to raise the question in the state courts. *Id.*

As applied to an interstate train terminated by a mail car, the law of Pennsylvania (Laws 1911, p. 1053, § 7), forbidding the operation

of any train consisting of United States mail, or express, cars, without the rear end of the rear car being equipped with a platform of thirty inches in width, with guard rails and steps, invades a subject of regulation fully occupied by Congress through the rules of the Postmaster General respecting the construction of mail cars and their equipment when used as end cars, and under the commerce clause, as is evinced by the Safety Appliance Act and the regulations of the Interstate Commerce Commission thereunder, particularly those permitting the employment of caboose cars, which are constantly used as end cars, without platforms. *Id.*

67 Pa. Super. Ct. Rep. 575, reversed.

THE case is stated in the opinion.

Mr. Frederic D. McKenney, with whom *Mr. John Spalding Flannery* was on the brief, for plaintiff in error.

Mr. William N. Trinkle, with whom *Mr. George F. Snyder* and *Mr. Berne H. Evans* were on the brief, for defendants in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This case was begun by a complaint to the Public Service Commission of Pennsylvania that the plaintiff in error, the Pennsylvania Railroad, ran a specified train the last car of which was not equipped at its rear end with a platform thirty inches in width, guard rails and steps, as required by a statute of Pennsylvania. Act of June 19, 1911, § 7. The train was moving in interstate commerce. The Railroad Company admitted the facts but contended that it was not bound by the statute because the rear car was a mail car constructed in accordance with the regulations of the Post Office Department, and because the Government of the United States had assumed control of the matter so far as to exclude such intermeddling on the part of a State. The Commission made an order that the Rail-

road Company should operate its train with the rear end of the rear car equipped as required by the state law. The Railroad Company appealed to the Superior Court, setting up that the order violated the commerce clause of the Constitution (Art. I, § 8), and that in view of the federal legislation and rules, including the order of the Interstate Commerce Commission dated March 13, 1911, and made under the Safety Appliance Act, and other matters referred to, the State Commission had no power to do what it did.

The Superior Court sustained the order holding itself bound by what it took to be the decision of the Supreme Court in *Pennsylvania R. R. Co.* v. *Ewing*, 241 Pa. St. 581, to the effect that nothing had been done by the United States inconsistent with the continued effect of the state law. An appeal to the Supreme Court was refused. On the strength of this it now is argued that the refusal must have been upon the ground that the Commission was a purely administrative body; that it had no judicial power to declare the statute unconstitutional; that therefore no question of the constitutionality of the act was before the Superior Court, and that this is implied because an appeal to the Supreme Court was a matter of right if the case had involved such a question. But whatever powers a State may deny to its commissions it cannot give them power to do what the laws of the United States forbid, whether they call their action administrative or judicial. The Superior Court treated the question as open. The Supreme Court merely denied an appeal upon a point that probably was thought to have been decided already by the Court.

We pass to the merits of the case. If all that had been done on behalf of the United States in the way of regulation had been to determine how mail cars should be built, and to exclude a thirty-inch platform, it might be said that the state law could be obeyed by putting a different

car at the end of the train. It would be a tax upon the railroad when the company wished to run a mail train wholly made up of mail cars, but it could be done and it is not necessary to say that the State could not require it. But when the United States has exercised its exclusive powers over interstate commerce so far as to take possession of the field, the States no more can supplement its requirements than they can annul them. *Southern Ry. Co.* v. *Railroad Commission of Indiana*, 236 U. S. 439, 446. *Charleston & Western Carolina Ry. Co.* v. *Varnville Furniture Co.*, 237 U. S. 597, 604. *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147. In the present instance the rules for the construction of mail cars, admitted to be valid, not only exclude the wide platform but provide an equipment for them when used as end cars. The Safety Appliance Act with its careful requirements for the safety of the men was followed by most elaborate regulations issued by the Interstate Commerce Commission which include three large pages of prescriptions for "Caboose Cars without Platforms." Caboose cars constantly are used as end cars and these pages like the Post Office order as to mail cars recognize the lawfulness of an end car such as the Pennsylvania statute forbids.

The question whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that belongs to it as to exclude the State, must be answered by a judgment upon the particular case. The subject-matter in this instance is peculiarly one that calls for uniform law and in our opinion regulation by the paramount authority has gone so far that the statute of Pennsylvania cannot impose the additional obligation in issue here. The Interstate Commerce Commission is continually on the alert, and if the Pennsylvania law represents a real necessity, no doubt will take or recommend steps to meet the need.

Judgment reversed.

MR. JUSTICE CLARKE dissenting.

Of course I agree with the majority of the court that if the United States had taken possession of the field involved in this controversy, the State could not supplement or annul its requirements or regulations, and it is because it seems to me clear that it has done nothing of the kind that I dissent from the conclusion of the court.

The Interstate Commerce Commission has never assumed control over the manner in which trains shall be made up, or manned, or moved, so far as I know,—certainly there is nothing in the record in this case to indicate that it has done so.

The section of the state statute held invalid has to do, not with individual cars, but with high speed trains of cars in operation, and it does not prescribe what the construction of mail or express cars shall be, but only that the rear car of trains made up of mail or express cars shall be equipped with a platform as prescribed, with "exits free from obstruction." It may be a mail car, or an express car, or a passenger coach or a caboose,—the only requirement is that it shall have a platform with guard rail and steps.

For the reason that federal authority had not occupied the field, this court has upheld state laws prescribing the number of men who must be employed to operate trains, *Chicago, Rock Island & Pacific Ry. Co.* v. *Arkansas*, 219 U. S. 453, the manner in which the cars of passenger trains shall be heated, *New York, New Haven & Hartford R. R. Co.* v. *New York*, 165 U. S. 628, the kind of headlight which engines shall carry, *Atlantic Coast Line R. R. Co.* v. *Georgia*, 234 U. S. 280, and that trainmen shall be subject to state examination as to their qualifications, *Smith* v. *Alabama*, 124 U. S. 465; *Nashville, Chattanooga & St. Louis Ry.* v. *Alabama*, 128 U. S. 96.

In this case the action of the court is rested chiefly on the single circumstance that the Interstate Commerce

Commission has prescribed requisites for "Caboose Cars without Platforms," and since caboose cars are constantly used as end cars, therefore it is concluded the Commission recognizes as lawful a type of end car which the state statute condemns.

If the construction prescribed for "Caboose Cars without Platforms" at all resembled or was even approximately the equivalent of the construction of express or mail cars in the respects essential to the safety and promptness of service on the rear end of fast trains, or if it appeared that such cabooses are or could be used on such trains, the inference might be justified, but the difference between the two is radical and fundamental. As thus: the illustrations in the record show that mail and express cars have only narrow stirrups and single handholds at the side doors and at their ends, and the ends are equipped with vestibule frames, which render access difficult and dangerous to the brake wheel and markers (signal lights and flags) and to the handholds and stirrups for mounting or alighting. But the requisites prescribed for a "Caboose without Platform" are, a curved and a straight handhold on opposite sides of each side door, and "Side-door Steps" under each door, with a minimum length of five feet, a minimum width of six inches, a minimum height of backstop of three inches, and hung a maximum height of only twenty-four inches from the top of rail. Such handholds, with such a long, wide and low-hanging step give facilities for mounting or alighting from such a caboose, when in motion, comparable in safety to those of an end platform, and are obviously much better and safer than those on mail or express cars.

The importance of rear-end signals cannot be overstated, yet the construction of the ends of express and mail cars, as shown in the illustrations in the record, is such that such signals can be observed by trainmen with difficulty, when the train is moving, and can be put in place

or removed only with great risk of injury, especially in time of storm of wind or rain or when the precarious foothold on the narrow ledge of the slightly extended end sill is covered with ice or snow. Such danger is entirely obviated by use of the inexpensive platform prescribed by the state statute.

To this we must add that a caboose is used only on slowly moving freight trains, while the state act deals only with fast trains, which start so rapidly that mounting them is especially dangerous for men, who, in the discharge of duty, must usually be on the ground to the last moment, for observation and for signalling, and with whom a few moments in alighting, when the emergency signal is given, may mean the difference between safety and disaster to themselves and to passengers and property on such and other trains.

It was to furnish facilities to employees for prompt and reasonably safe mounting and alighting from these fast trains and for the discharge of other duties without excessive danger that the statute was enacted, and it seems to me, for the reasons stated, that permitting the use of cabooses without platforms does not cover the rear end requirements of fast express and mail trains, and that the court, in its decision, makes a misapplication of that permission.

It will excite surprise in many minds that the plaintiff railroad company does not make, as it is believed many carriers do make, such provision as this statute requires, or its equivalent, from motives of economy, as a protection from injury to employees and danger to property as well as from the humanitarian motive so obviously involved.

Believing, as I do, that the section of the state statute is a humane, reasonable and intelligent provision for promoting the safety of employees, passengers and property arising from special conditions on the lines of railway, and

that there is no federal provision having a like purpose, I decline to share in striking down as unconstitutional a law passed by the legislature of Pennsylvania, approved by the Public Service Commission of that State as reasonable and necessary and, as I think, by its highest court as constitutional.

PELL ET AL. *v.* McCABE ET AL.

APPEAL FROM AND CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Nos. 311, 335. Argued October 16, 1919.—Decided November 10, 1919.

One who has not been subjected to the jurisdiction in an action *in personam* in another State cannot maintain a bill to enjoin its prosecution. P. 574.

A firm of bankrupts having offered a composition conditioned among other things that one T, who claimed to be a special partner only, should be released from liability to the firm or to any of its creditors assenting to the composition upon giving up a scheduled claim and assuming certain obligations for which securities of his were pledged, T in an agreement with the receivers accepted the composition and agreed to pay the obligations upon return of the securities, the equities in which he agreed to hold for the estate in case he should be adjudged a general partner. The District Court, having approved this agreement, later, in confirming the composition, relieved T, upon performance, from further liability to the receivers or the estate under the prior order "or otherwise," and dismissed pending petitions to have him declared a general partner and adjudged a bankrupt. *Held:* (1) That the decree did not estop persons, who though they had paid a claim and disputed another, did not appear in the bankruptcy proceedings, assent to the composition, or prove a claim, from prosecuting an action against T in a court of another State seeking to hold him as a general partner of the bankrupts for an after-discovered fraud; (2) that the District Court had no jurisdiction ancillary to the bankruptcy decree to enjoin such action. P. 576.

The scope of a decree set up as a basis for ancillary jurisdiction cannot be affected by an admission by demurrer. P. 577.
256 Fed. Rep. 512, affirmed.

THE case is stated in the opinion.

Mr. Lindley M. Garrison, with whom *Mr. Emanuel J. Myers* and *Mr. Gordon S. P. Kleeberg* were on the briefs, for appellants and petitioners.

Mr. William St. John Tozer and *Mr. Henry Buist*, with whom *Mr. George L. Buist* was on the briefs, for appellees and respondents.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought in the District Court of the United States for the Southern District of New York, by persons formerly doing business as partners under the name S. H. P. Pell & Co., to restrain the defendants from proceeding with a suit against them in South Carolina charging them with fraud in partnership transactions in cotton and seeking to recover a million and a half of dollars. The bill was dismissed on demurrer for want of equity by the District Court, 254 Fed. Rep. 356, and for want of jurisdiction by the Circuit Court of Appeals, 256 Fed. Rep. 512. It is brought here by certiorari (No. 311) and by appeal (No. 335).

The ground of jurisdiction set up is that the bill is ancillary to proceedings in bankruptcy against S. H. P. Pell & Co. in the same district. The present plaintiff Thompson was the only party served in the South Carolina suit and he alleges that he was a special partner under the laws of New York, that he was adjudicated not to be liable as a general partner in the bankruptcy proceedings and that the Court had ancillary jurisdiction to make its decree respected. The other partners set up a discharge under a

composition but as they were not served with process in South Carolina the only question raised before us is whether Thompson can maintain the bill.

The bill discloses the following facts. After the appointment of receivers in the bankruptcy proceedings petitions were filed to have Thompson declared a general partner and adjudicated a bankrupt with the other members of the firm. Later an offer of composition was made by the firm in consideration of the discharge of the bankrupts from their debts and the release of Thompson from liability to S. H. P. Pell & Co. and to any creditor of the firm who should assent to the composition. By the terms of the composition Thompson gave up a scheduled claim of over three million dollars and assumed obligations of over two million dollars for which property of his was pledged. Pursuant to this offer an agreement was made between Thompson and the receivers by which Thompson accepted the composition and agreed to pay the last mentioned obligations and the receivers agreed to turn over the pledged securities to him, he undertaking in case it should be adjudged that he was a general partner to hold the equities in the same as trustee for the estate—all conditioned upon the Court making an order approving the contract. The order was made on January 6, 1915. On January 25, 1915, the composition was declared to be for the best interests of his estate and the creditors thereof, it and the arrangement with Thompson were confirmed, and it was decreed that on his complying with its terms he should be "relieved of any further liability to the said receivers or to the estate by reason of the order heretofore entered by this Court dated January 6, 1915, or otherwise." It was further decreed that the petitions to have Thompson declared liable as a general partner be dismissed. The defendants had been notified of the bankruptcy and the appointment of receivers, had paid one claim made against them for the estate and had disputed another which is now the subject

of a suit in New York, but they did not appear in the bankruptcy proceedings, assent to the composition, or attempt to prove a claim.

We believe that we have stated the essential facts relied upon to support the bill. They seem to us not sufficient for that purpose. It is said that in pursuance of a contract sanctioned by the Court there was a settlement with Thompson discharging him from all liability to the firm and anyone claiming under it. We do not perceive that the decree just recited even purports to deal with the defendants' claim, and reading it in connection with the proposal as to Thompson in the offer of composition we find it at least difficult to understand it to have been directed against other creditors than those who assented to the latter. It is argued, to be sure, that the petitions seeking to charge Thompson as a general partner were dismissed out and out and that that portion of the decree at least must be taken to operate *in rem* and decide against all the world that he was not one. But it would be going far to say that the dismissal was not to be read with the rest of the decree in determining its scope, especially when it is remembered that the composition bound the parties who brought the petitions thus dismissed. It is altogether probable that the dismissal was by consent. However this may be, the decree only determined as against everybody that Thompson's property should not be administered in the bankruptcy proceedings; it did not conclusively establish as against the present defendants the finding of facts upon which it is supposed to have been based, if there is any reason to suppose that the facts as to his relation to the firm were found. *Gratiot State Bank* v. *Johnson*, 249 U. S. 246. *Manson* v. *Williams*, 213 U. S. 453.

The claim of the present defendants in their action in South Carolina is based as we have said upon allegations of fraud, and it is further alleged in their complaint that they believed the representations said to be fraudulent

until long after the decree set up here as a bar. If those allegations are proved the composition would not discharge the claim, and of course they were not passed upon in the bankruptcy Court. A decree that, as we have tried to show, cannot be taken to deal with the defendants' rights does not give ancillary jurisdiction to the District Court to enforce it against them. The concession by the demurrer that Thompson was a special partner does not affect the scope of the decree, and the jurisdiction depends upon that alone. It is true that if he was only liable as a special partner the South Carolina suit cannot be maintained, but the allegations of fraud open the whole matter and moreover the question here is not whether that suit can be maintained but whether an injunction against it should be issued by the District Court.

The appeal is dismissed and upon the writ of certiorari the decree dismissing the bill is affirmed.

Appeal dismissed.
Decree affirmed.

PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY *v.* FINK.

ERROR TO THE COURT OF APPEALS OF MONTGOMERY COUNTY, STATE OF OHIO.

No. 2. Argued October 7, 1919.—Decided November 10, 1919.

Under the Act to Regulate Commerce, it is unlawful for a carrier to accept less than the tariff rate as compensation for the interstate transportation of goods. P. 581.

A consignee accepting delivery of the goods must be presumed to have understood this. *Id.*

The carrier has a lien for the lawful charges until they are tendered or paid, and a consignee who obtains the goods at destination upon

payment of less, due to a misunderstanding by himself and the carrier of the rate lawfully applicable, must be deemed to have assumed the obligation of paying the full lawful rate, and is liable to the carrier accordingly. P. 582.

An agreement with the consignor that title to the goods shall not pass to the consignee until delivery can not alter the situation. *Id.*

Nor can the hardship to the consignee, resulting from his misunderstanding and subsequent change of situation in reliance on it; since the requirements of the statute can not be avoided by estoppel. *Id.*

19 Ohio C. C. (n. s.) 103, reversed.

THE case is stated in the opinion.

Mr. William M. Matthews, with whom *Mr. Edwin P. Matthews* was on the brief, for plaintiff in error.

Mr. Roy G. Fitzgerald, with whom *Mr. Thos. H. Ford*, *Mr. Wayne F. Lee* and *Mr. Wm. F. Hyers* were on the brief, for defendant in error:

Fink neither expressly nor impliedly agreed to pay any freight. The railroad company made it a condition that he pay the bill before he could examine the goods offered him by the shipper; and *Union Pacific R. R. Co.* v. *American Smelting & Refg. Co.*, 202 Fed. Rep. 720, is therefore not applicable. Plaintiff in error's other cases are based upon bills of lading stipulating that the "consignee is to pay the freight."

As between Fink and the railroad company, the principle of estoppel still applies as stated in Hutchinson on Carriers, 3d ed., § 807, and *Central Railroad of New Jersey* v. *MacCartney*, 68 N. J. L. 165; for, while the amount of the freight rate is not the subject of private contract, the law must not be used as an instrument of injustice and oppression, and that without any justification based upon the requirement of the Interstate Commerce Act to collect the lawful freight, since the consignor is primarily liable and, even if the charges were to be collected from the con-

signee, the liability of the consignor is not discharged. *British & F. M. Ins. Co.* v. *Portland F. M. Co.*, 124 Fed. Rep. 855; 130 Fed. Rep. 860; *Finn* v. *Railroad Co.*, 112 Massachusetts, 524; Hutchinson on Carriers, § 810; *Atlas S. S. Co.* v. *Colombian Land Co.*, 102 Fed. Rep. 358; *Great Western Ry. Co.* v. *Bagge & Co.*, 15 Q. B. Div. 626; *Baltimore & Ohio S. W. Ry. Co.* v. *New Albany Box Co.*, 48 Ind. App. 647; *Keeling* v. *Connally & Co.*, 157 S. W. Rep. 232; *Chicago &c. Ry. Co.* v. *Floyd*, 161 S. W. Rep. 954.

The Interstate Commerce Act simply enjoins upon a carrier the duty of collecting the proper freight charges from the party who is legally liable at common law to pay, and does not create any new liability or impose any additional burden upon consignor or consignee. [Quoting from § 6 of Interstate Commerce Act of 1887, and amendments; Rule No. 314, Collection of Undercharges, Conference Rulings of the Interstate Commerce Commission.]

At common law there is a presumption of fact that the consignee is the owner of goods shipped and hence liable for freight. 4 Elliott on Railroads, § 1559. But this presumption may be rebutted by proof of the facts, as in this case. *Blanchard* v. *Page*, 8 Gray, 281; *Sanders* v. *Van Zeller*, 4 Ad. & El. N. S. 260; Van Zile on Bailments and Carriers, § 702; *Lawrence* v. *Minturn*, 17 How. 100.

Fink's position in this case is sustained by well considered opinions in the States of Alabama and New York. *Central of Georgia Ry. Co.* v. *Southern Ferro C. Co.*, 193 Alabama, 108; *Pennsylvania R. R. Co.* v. *Titus*, 156 App. Div. 830. See also, *Frontier S. S. Co.* v. *Central Coal Co.*, 234 Fed. Rep. 30.

MR. JUSTICE DAY delivered the opinion of the court.

An action was brought by the Railway Company before a Justice of the Peace in Montgomery County, Ohio, to

recover fifteen dollars, the freight charges upon a shipment in interstate commerce from Los Angeles, California, to Dayton, Ohio. The defendant, Fink, prevailed in the Magistrate's court, the judgment was reversed in the Court of Common Pleas, the case was taken to the Court of Appeals of Montgomery County where the judgment of the Court of Common Pleas was reversed and that of the Magistrate affirmed. 19 Ohio Circuit Court, New Series, 103. The Supreme Court of Ohio denied a motion to require the record to be certified to it by the Court of Appeals, and the case is here upon writ of error to the Court of Appeals of Montgomery County, Ohio.

The facts are that the railroad company on September 13, 1910, delivered to Fink, the consignee, two boxes of Indian relics shipped to him at Dayton, Ohio, from Los Angeles, California, the waybill specifying charges in the sum of fifteen dollars, which sum Fink paid upon receipt of the goods. The tariff rates filed with the Interstate Commerce Commission so classified this merchandise that the transportation charges should have been thirty dollars instead of fifteen. It is for the difference that this action is prosecuted.

It appears that Fink had dealt with the consignor at Los Angeles in suchwise that some old coins, belonging to Fink, were to be traded for a collection of Indian relics. Fink shipped the coins to the postmaster at Los Angeles to be held for his protection. At the time the action was brought, about one year after the shipment, the postmaster had released the coins, and Fink had sold some of the relics. Fink testified that he had no knowledge of the freight classification and rates, and simply paid the freight bill as it was presented to him. No agreement appears to have been made with the consignor that Fink should pay the freight charges.

Examination shows some conflict of authority as to the liability at common law of the consignee to pay freight

charges under the circumstances here shown. The weight of authority seems to be that the consignee is *prima facie* liable for the payment of the freight charges when he accepts the goods from the carrier. (See the cases collected and discussed in 4 Elliott on Railroads, § 1559.) However this may be, in our view the question must be decided upon consideration of the applicable provisions of the statutes of the United States regulating interstate commerce. The purpose of the Act to Regulate Interstate Commerce, frequently declared in the decisions of this court, was to provide one rate for all shipments of like character, and to make the only legal charge for the transportation of goods in interstate commerce the rate duly filed with the Commission. In this way discrimination is avoided, and all receive like treatment, which it is the main purpose of the act to secure.

Section 6 of the Act to Regulate Commerce, which was in force at the time of this shipment, provides: "Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except as are specified in such tariffs." It was, therefore, unlawful for the carrier upon delivering the merchandise consigned to Fink to depart from the tariff rates filed. The statute made it unlawful for the carrier to receive compensation less than the sum fixed by the tariff rates duly filed. Fink, as well as the carrier, must be presumed to know the law, and to have understood that the rate charged could lawfully be only the one fixed by the tariff. When the carrier turned over

the goods to Fink upon a mistaken understanding of the rate legally chargeable, both it and the consignee undoubtedly acted upon the belief that the charges collected were those authorized by law. Under such circumstances consistently with the provisions of the Interstate Commerce Act the consignee was only entitled to the merchandise when he paid for the transportation thereof the amount specified as required by the statute. For the legal charges the carrier had a lien upon the goods, and this lien could be discharged and the consignee become entitled to the goods only upon tender or payment of this rate. *Texas & Pacific Ry. Co.* v. *Mugg*, 202 U. S. 242. The transaction, in the light of the act, amounted to an assumption on the part of Fink to pay the only legal rate the carrier had the right to charge or the consignee the right to pay. This may be in the present as well as some other cases a hardship upon the consignee due to the fact that he paid all that was demanded when the freight was delivered; but instances of individual hardship cannot change the policy which Congress has embodied in the statute in order to secure uniformity in charges for transportation. *Louisville & Nashville R. R. Co.* v. *Maxwell*, 237 U. S. 94. In that case the rule herein stated was enforced as against a passenger who had purchased a ticket from an agent of the company at less than the published rate. The opinion in that case reviewed the previous decisions of this court, from which we find no occasion to depart.

It is alleged that a different rule should be applied in this case because Fink by virtue of his agreement with the consignor did not become the owner of the goods until after the same had been delivered to him. There is no proof that such agreement was known to the carrier, nor could that fact lessen the obligation of the consignee to pay the legal tariff rate when he accepted the goods. *Pennsylvania R. R. Co.* v. *Titus*, 216 N. Y. 17. Nor can the defendant in error successfully invoke the principle of estop-

pel against the right to collect the legal rate. Estoppel could not become the means of successfully avoiding the requirement of the act as to equal rates, in violation of the provisions of the statute. *New York, New Haven & Hartford R. R. Co.* v. *York & Whitney Co.*, 215 Massachusetts, 36, 40.

In our view the Court of Common Pleas correctly held Fink liable for the payment of the remaining part of the legal rate upon the merchandise received by him. The judgment of the Court of Appeals of Montgomery County, Ohio, is reversed, and the cause remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

STILSON v. UNITED STATES.

SUKYS v. UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Nos. 264, 265. Argued October 20, 21, 1919.—Decided November 10, 1919.

The denial of a severance in a criminal case is within the discretion of the judge. P. 585.

The Constitution does not require Congress to grant peremptory challenges to defendants in criminal cases; and the long-standing provision of law (now in Jud. Code, § 287) that all of several defendants shall be treated as one for the purposes of such challenges does not infringe the right to an impartial jury guaranteed by the Sixth Amendment. *Id.*

In a prosecution for conspiracy to violate the Espionage and Selective Service Acts, where the jury were in substance instructed to consider certain publications uttered by the defendants, and determine from them, considered with all the other evidence, whether they

amounted to violations, *held*, that related portions of the charge, on their right to call upon their general knowledge and information, were not objectionable. P. 587.

The district judge is not required to analyze and discuss the details of the evidence, particularly when not requested to comment upon any special phase of it. P. 588.

The evidence in this case was ample to justify the District Court in submitting the question of the defendants' guilt to the jury. *Id.*

254 Fed. Rep. 120, affirmed.

THE case is stated in the opinion.

Mr. Henry John Nelson for plaintiffs in error.

Mr. Assistant Attorney General Stewart, with whom *Mr. W. C. Herron* was on the brief, for the United States.

MR. JUSTICE DAY delivered the opinion of the court.

The plaintiffs in error were indicted with two others, not apprehended, and were convicted under the conspiracy section (4) of the Espionage Act, 40 Stat. 217, 219. The section which the plaintiffs in error were charged with a criminal conspiracy to violate (3), provides: " . . . whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, . . . shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both."

A second count in the indictment charged a conspiracy to violate certain provisions of the Selective Service Act. The sentences imposed, within the act upon either count of the indictment, were three years' imprisonment for Stilson and three months for Sukys. The Government does not press the conviction upon the second count.

The overt acts charged to have been committed in pursuance of the conspiracy consisted of the publication and distribution of a certain newspaper called "Kova" and circulars published in the Lithuanian language. The cases come directly to this court because of constitutional questions raised and decided in the court below. Since the proceedings in that court some of the constitutional questions have been determined, and need not be considered. *Schenck* v. *United States*, 249 U. S. 47; *Frohwerk* v. *United States*, 249 U. S. 204; *Debs* v. *United States*, 249 U. S. 211.

Counsel for plaintiffs in error in view of these decisions only press for consideration certain assignments of error comprised in the following summary:

1. Whether or not, in ruling that there could be no severance of defendants and that a peremptory challenge by one defendant should count as a challenge by all defendants, the trial Judge was in error under Article VI of the Amendments of the United States Constitution.

2. Whether or not the trial Judge erred in his charge to the jury in that portion thereof in which he said the jury might determine the guilt of the defendants from general information.

3. Whether or not the trial Judge erred in not refreshing the jury's memory as to the evidence.

4. Whether or not the trial Judge erred in overruling a motion to take the case away from the jury, and in refusing to charge the jury, "Under all the evidence your verdict should be 'not guilty.'"

Of these in their order:

1. It is provided in the Sixth Amendment to the Constitution of the United States that in all criminal prosecutions the accused shall enjoy the right to a trial by an impartial jury. That it was within the discretion of the court to order the defendants to be tried together there can be no question, and the practise is too well established

to require further consideration. The contention raised under the Sixth Amendment comes to this: That because plaintiffs in error were not each allowed ten separate and independent peremptory challenges they were therefore denied a trial by an impartial jury. The statute regulating the matter of peremptory challenges is clear in its terms and provides: "When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to six peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten and the United States to six peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section. All challenges, whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the court without the aid of triers."

The requirement to treat the parties defendant as a single party for the purpose of peremptory challenges has long been a part of the federal system of jurisprudence; it certainly dates back to 1865 and was adopted in the Revised Statutes, and has now become a part of the Judicial Code. § 287, 36 Stat. 1166. *Schwartzberg* v. *United States*, 241 Fed. Rep. 348. There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured. The number of challenges is left to be regulated by the common law or the enactments of Congress. That body has seen fit to treat several defendants, for this purpose, as one party. If the defendants would avail themselves of this privilege they must act accordingly. It may be, as is said to have been the fact in the trial of the present case, that all defendants may not wish to exercise the right of peremptory

challenge as to the same person or persons, and that some may wish to challenge those who are unobjectionable to others. But this situation arises from the exercise of a privilege granted by the legislative authority and does not invalidate the law. The privilege must be taken with the limitations placed upon the manner of its exercise.

2. It is insisted that there was prejudicial error in so much of the charge as is contained in the following language:

"The next question for you to determine is the presence of essential elements. One of them is, for instance, that the United States is at war. Secondly, that what was done was an attempt to cause insubordination, or what was done did amount to obstructing enlistment, and the question may arise in your mind how you are to determine that. Whenever you are asked as a jury to pass upon anything which is a matter within common knowledge, common information, things which people ordinarily know, which are generally and practically universally known, when you are passing upon such questions, you have the right to call upon your general knowledge and information. You must determine, for instance, the question whether or not we are at war, because unless we are, this indictment goes for nothing. You may determine that from your general information, this is something of which, in the phrase of the law, the law takes judicial notice. So also when you come to determine the question of whether or not there was an attempt to cause insubordination, you take, of course, all the evidence into the case, and you have a right to direct your minds, as naturally you would, to the character of these publications themselves, these pamphlets and these articles, and determine from them, assisted by all the other evidence in the case, whether or not they do reach the dignity of the charge of attempting to cause insubordination, or amount to an obstruction of enlistment."

Certainly no prejudice could arise from an instruction that the jury might be supposed to know the fact that the country was at war. As to the other part of the charge,—the jury were told to look at all the evidence, including the character of the publications, and determine from them whether there was an attempt to cause insubordination and a willful obstruction of enlistment; in other words—whether they amounted to a substantial violation of the statute. We find no well-founded objection to this part of the charge. It is true this language was used in connection with the observations concerning judicial notice as to the country being in a state of war, but we are of opinion, taking the charge together, that the question was fairly left to the jury upon the evidence in the part of the instruction which we have quoted, which left to it to determine whether the facts made a case coming within the denunciation of the statute.

3. It is contended that the court did not analyze and discuss the details of the evidence. The trial judge left matters of fact to the determination of the jury in a charge commendable for its fairness. Certainly the lack of discussion in detail does not amount to a valid objection; particularly in the absence of any specific request for comment upon any special phase of the testimony.

4. As to the contention that there was no evidence to warrant the convictions of the accused—it must be borne in mind that it is not the province of this court to weigh testimony. It is sufficient to support the judgment of the District Court, if there was substantial evidence inculpating the defendants which, if believed by the jury, would justify the submission of the issues to it. It would serve no good purpose to set forth the contents of the newspaper articles and the circulars, the publication and distribution of which were alleged to be the overt acts in furtherance of the alleged conspiracy. That they contain appeals tending to cause disloyalty and refusal of duty in

the military forces of the United States, and to obstruct the recruiting and enlistment service of the Government is sufficiently apparent on the face of the publications. That those who by concerted action prepared and circulated such writings could be found guilty of a conspiracy is equally clear. The connection of the plaintiffs in error with the Lithuanian Socialist Federation, whose membership was shown to be actively opposed to the prosecution of the war, is apparent from a perusal of the record. Stilson was the translator-secretary of the Federation. There is evidence tending to show that one of the circulars entitled: "Let us not go to the army" was mimeographed from the typewriter controlled and operated by him. Language of the same character as that set forth in the incriminating circulars is found in articles in evidence which were admittedly written by him.

Sukys had been a correspondent of "Kova," and was afterwards manager of the Kova printing plant and was appointed by the executive committee of the Federation, and incriminating acts of his are clearly shown in the record.

We agree with the trial court that there was ample testimony justifying the submission of the question of the guilt of the accused to the jury, who found both of the plaintiffs in error guilty of concerted action amounting to a conspiracy to violate the provisions of the act. We find no error in this record, and the judgments are

Affirmed.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS, dissented on the ground that as the sentence was upon a general verdict of guilty on both counts, one of which is not sustained, the judgment should be reversed.

MULLEN ET AL. *v.* PICKENS ET AL.

MULLEN ET AL. *v.* GARDNER ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

Nos. 25, 26. Submitted October 13, 1919.—Decided November 10, 1919.

Under the Choctaw and Chickasaw Supplemental Agreement (Act of July 1, 1902, c. 1362, 32 Stat. 641,) the heirs of a deceased Indian acquire no vendible interest, before selection, in land that may be allotted in his name for their benefit under § 22; and their warranty deed cannot operate, by estoppel or otherwise, to convey land selected and allotted after it was made. P. 592. *Franklin* v. *Lynch*, 233 U. S. 269, followed. *Mullen* v. *United States*, 224 U. S. 448; *Doe* v. *Wilson*, 23 How. 457; *Jones* v. *Meehan*, 175 U. S. 1, distinguished.

So *held* where the lands claimed were selected and allotted in lieu of other lands, described in the deeds, which had been selected before the deeds were made but were afterwards allotted to other selectors.

56 Oklahoma, 65; 57 *id.* 186, affirmed.

THE cases are stated in the opinion.

Mr. Fred R. Ellis for plaintiffs in error. *Mr. F. M. Adams* was on the briefs.

No appearance for defendants in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

These cases were submitted together and involve but a single question, which turns upon the effect to be given to the provisions of the Supplemental Agreement with the Choctaw and Chickasaw tribes of Indians (Act of July 1, 1902, c. 1362, 32 Stat. 641) relating to the allotment of the tribal lands. In each case an enrolled Indian died subsequent to the ratification of the Agreement and before

selection of an allotment; in each case the personal representative selected lands for allotment in the name of the deceased Indian, which shortly afterwards were attempted to be conveyed by the heirs of such Indian by warranty deeds through which plaintiffs in error claim, each of which deeds contained a clause to the effect that if for any reason the selection of the lands described in the deed should be set aside, other lands should be selected instead, and these should pass to the grantees, and the grantors would execute further conveyances if necessary. In each case the selection for allotment thus made was set aside in contest proceedings, and another selection thereafter made, followed by an allotment in the name of the deceased Indian. And the question is whether plaintiffs in error, by virtue of the deeds for the prior selections and the special covenants contained in them, are entitled in equity to the lands subsequently allotted. The Supreme Court of Oklahoma held not. *Mullen* v. *Pickens*, 56 Oklahoma, 65; *Mullen* v. *Gardner*, 57 Oklahoma, 186. Its judgments were entered before the taking effect of the Act of September 6, 1916, c. 448, 39 Stat. 726, amending § 237, Judicial Code, and the present writs of error were applied for and allowed within the time permitted by § 7 of the amending act.

Pertinent provisions of the Supplemental Agreement are set forth in the margin.[1]

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[1] 11. There shall be allotted to each member of the Choctaw and Chickasaw tribes, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to three hundred and twenty acres of the average allottable land of the Choctaw and Chickasaw nations, and to each Choctaw and Chickasaw freedman, as soon as practicable after the approval by the Secretary of the Interior of his enrollment, land equal in value to forty acres of the average allottable land of the Choctaw and Chickasaw nations; . . .

12. Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred and sixty acres of the average allottable land

In *Franklin* v. *Lynch*, 233 U. S. 269, a white woman, widow of a Choctaw Indian, having applied to be admitted as a member of the tribe by intermarriage, made a warranty deed in October, 1905, for lands exclusive of homestead which might be finally allotted to her, with an accompanying agreement to make conveyance when the land should be actually allotted. Thereafter she was enrolled as an intermarried citizen, made her selection, and received a patent for land, all of which, except the homestead, she sold for value to other parties. This court held (affirming the Supreme Court of Oklahoma) that the earlier deed and the agreement were void because until allotment the Indian had no undivided interest in the tri-

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of the Choctaw and Chickasaw nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead.

15. Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this Act, nor shall said lands be sold except as herein provided.

16. All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent: *Provided*, That such land shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value.

22. If any person whose name appears upon the rolls, prepared as herein provided, shall have died subsequent to the ratification of this agreement and before receiving his allotment of land the lands to which such person would have been entitled if living shall be allotted in his name, and shall, together with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: *Provided*, That the allotment thus to be made shall be selected by a duly appointed administrator or executor. . . .

bal land nor any vendible interest in any particular tract, and because the attempted conveyance was in conflict with the provisions of §§ 15 and 16 of the Supplemental Agreement to the effect that lands allotted should not be affected by any deed, debt, or obligation contracted prior to the time at which such land might be alienated under the act, and should not be alienable except after issuance of patent. It was contended that the prohibition against sale, in its application to the particular case, had been removed by the Act of April 21, 1904, c. 1402, 33 Stat. 189, 204, providing that "All the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood" should be removed. But we held that while this removed the restriction to the extent of permitting members who were not of Indian blood to sell land after it had been actually allotted in severalty, it did not permit even a non-Indian to sell a mere float or expectancy.

It is insisted that a different rule must be applied with respect to lands allotted pursuant to § 22 in the name of a deceased member for the benefit of his heirs, as to which there is no express restriction upon alienation like those found in §§ 15 and 16, and, in the absence of such restriction, no obstacle in the way of the owner conveying his equitable interest after allotment, as was held by this court in *Mullen* v. *United States*, 224 U. S. 448, 457; (and see like rulings, as to the corresponding provisions of the Creek Agreement, in *Skelton* v. *Dill*, 235 U. S. 206, 210, and *Woodward* v. *DeGraffenried*, 238 U. S. 284, 319). But the decision in *Franklin* v. *Lynch*, *supra*, was based not alone upon the express restrictions, but upon the absence of individual interest in the tribal land prior to allotment and the general policy of the Agreement not to permit the improvident sales that would result if a prospective allottee were enabled to sell his expectancy.

We have not overlooked the fact that in construing a

treaty made October 27, 1832 (7 Stat. 399), between the United States and the Pottawatomie Indians, ceding their possessory interest in certain lands to the United States, with a reservation of a considerable number of sections to particular named Indians to be granted to them when selected, it was held by this court in two cases that the treaty itself converted the reserved sections into individual property and created an equitable interest that was the subject of sale and conveyance, and that warranty deeds made prior to selection operated to vest the title in the grantee as soon as the lands were selected and patented. *Doe* v. *Wilson* (1859), 23 How. 457; *Crews* v. *Burcham* (1861), 1 Black, 352. Nor that a similar result was reached in *Jones* v. *Meehan*, 175 U. S. 1, 21, 23, 32, under the provisions of a treaty with certain bands of Chippewa Indians made October 2, 1863, by which a particular reservation was set apart for one of their principal chiefs.

But we deem it impossible in right reason to apply the doctrine of these decisions to the case in hand. Section 22 of the Supplemental Agreement provides not for any special grant or reservation in favor of particular Indians upon any special meritorious consideration, but makes a substituted provision, in the allotment scheme, in favor of the heirs of any enrolled Indian who might happen to die after the ratification of the Agreement and before selection of his allotment. In the absence of anything to the contrary, the lands prior to allotment were to remain communal, without private interest that was capable of descent or alienation. *Gritts* v. *Fisher*, 224 U. S. 640, 642; *Sizemore* v. *Brady*, 235 U. S. 441, 449–451. And no reason is suggested, nor does any occur to us, for creating by implication from the provisions of § 22 a separate interest or equity in the heirs of a deceased member prior to allotment that by the general scheme of the act and the express provisions of §§ 15 and 16 was withheld from a member entitled to receive an allotment in his own right. The

implication is clearly to the contrary; and we hold that not only by the terms of § 22 does the equity of the heir of a deceased member take its inception at the selection of the allotment, but that any previous attempt to sell his expectancy is contrary to the spirit and policy of the act.

Mullen v. *United States*, 224 U. S. 448, 457, cited by plaintiffs in error, is not in point, for the lands there in controversy had been duly allotted, and the only question was whether they might be alienated thereafter and before the issuance of patent, a question affirmatively answered by reference to the proviso of § 19 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, 144.

In confirmation of our view as to the meaning and effect of § 22 of the Supplemental Agreement, reference may be made to several acts of Congress respecting restrictions upon the lands of the Five Civilized Tribes, containing some provisions for their removal, and others for their maintenance except so far as removed, the language of which is inconsistent with the theory that there was any individual interest or equity in such lands prior to the selection of an allotment. Act of April 21, 1904, c. 1402, 33 Stat. 189, 204; Act of April 26, 1906, c. 1876, § 19, 34 Stat. 137, 144; Act of May 27, 1908, c. 199, 35 Stat. 312. They amount to a legislative declaration of the true intent and meaning of the Agreements respecting allotment of the lands of these tribes.

The provisions of the Supplemental Agreement having permitted no conveyance of an interest in the tribal lands prior to allotment, it is obvious that this policy cannot be evaded by giving to a conveyance with warranty or its equivalent, made prior to actual allotment, effect as a covenant to convey an allotment thereafter to be selected, either upon the ground of estoppel or because of any state statute having like force. *Starr* v. *Long Jim*, 227 U. S. 613, 624; *Monson* v. *Simonson*, 231 U. S. 341, 347.

Judgments affirmed.

NEW YORK CENTRAL RAILROAD COMPANY *v.* BIANC.

AMERICAN KNIFE COMPANY ET AL. *v.* SWEETING.

CLARK KNITTING COMPANY, INC., ET AL. *v.* VAUGHN.

ERROR TO THE SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, OF THE STATE OF NEW YORK.

Nos. 374–376. Argued October 22, 23, 1919.—Decided November 10, 1919.

The amendment to the New York Workmen's Compensation Law (*cf. New York Central R. R. Co.* v. *White*, 243 U. S. 188,) providing that, in case of an injury resulting in serious facial or head disfigurement, the commission may, in its discretion, make such award or compensation as it may deem proper and equitable, in view of the nature of the disfigurement, but not to exceed $3,500 (Laws 1916, c. 622,) is not an arbitrary or oppressive exercise of the police power and does not deprive the employer of property without due process in violation of the Fourteenth Amendment. P. 600.

In providing for the compensation of workmen injured in hazardous industries, the State need not base it exclusively on loss of earning power. P. 601.

Whether an award for such disfigurement should be made in combination with or independently of the award for mere inability to work, and whether the compensation should be paid in a single sum or in instalments, are matters of detail for the State to determine. P. 603.

226 N. Y. 199, affirmed.

THE cases are stated in the opinion.

Mr. Robert E. Whalen, with whom *Mr. Frank V. Whiting* was on the brief, for plaintiff in error in No. 374:

The additional award is wholly unrelated to claimant's ability to work. There is not the slightest intimation that the disfigurement has impaired claimant's earning capacity beyond the period for which he was awarded a separate amount for the entire period of disability. Moreover, when that award was made, plaintiff had returned to work.

Only impairment of earning power justifies compulsory payment of workmen's compensation for disabling or fatal injuries inflicted without fault. *New York Central R. R. Co.* v. *White*, 243 U. S. 188, 203–206; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 236, 239, 243. This court has pointed out that "compensation for disabling and fatal injuries irrespective of the question of fault" was involved in the decisions of the cases which sustained the New York and the Washington Acts. *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152, 163. Mr. Justice Pitney, writing for the majority in *Arizona Employers' Liability Cases*, *ante*, 400, 425, affirmed the power of the people of Arizona to erect safeguards against "leaving the injured ones, and the dependents of those whose lives are lost, through accidents due to the conditions of the occupation, to be a burden upon the public." And at p. 428 he adverted to the sovereign power thus to regulate the conduct of those hazardous industries in which "human beings . . . in the pursuit of a livelihood must expose themselves to death or to physical injuries more or less disabling, with consequent impoverishment, partial or total, of the workman or those dependent upon him."

In *Ball* v. *William Hunt & Sons, Ltd.*, [1912] App. Cas. 496, cited in Mr. Justice Holmes' concurring opinion in the *Arizona Case*, p. 433, Lord Shaw of Dunfermline declared that "the theory and datum upon which such compensation proceeds is that of compensation for injury to the worker as a wage-earner, and it is the incapacity to

earn a wage which forms the standard upon which the compensation is reckoned." (P. 507.)

In the *Arizona Case*, p. 426, a feature of the Arizona Act which was considered to be an element of guaranty of due process was the provision for trial of issues of fact and assessment of damages before a constitutional jury, in a judicial tribunal, in accordance with long established modes and ordinary processes of law—"substantially the common law method." In the case at bar no such safeguard was vouchsafed. Due process of law, however, contemplates that damages, as distinguished from compensation for loss or diminution of earning power during hazardous employment, shall be fixed and awarded, if at all, by a jury and not by a board. Damages, when awarded, must represent the deliberate judgment of a tribunal vested with and exercising judicial functions, not the determination of a body which is clothed with statutory power to proceed as summarily as a court-martial. (§§ 20, 68, N. Y. Workmen's Compensation Act.) See *Erie R. R. Co.* v. *Linnekogel*, 248 Fed. Rep. 389, 392.

The disfigurement clause is not a reasonable exercise of the police power. *White Case, supra*, pp. 206, 207; *Mountain Timber Co. Case, supra*, 238, 243; *Arizona Case, supra*, 420–422.

If, as recognized at p. 207 of the opinion in the *White Case*, the New York Act is not, nor is it asserted to be, a measure in furtherance of health or safety, it remains simply to inquire whether the disfigurement clause has any reasonable relation to the general welfare. The question carries its own answer, since, once adequate provision has been made for loss or diminution of earning capacity, it is of no public concern whether the claimant shall or shall not receive a further award for impairment of good looks not in any wise related to earning power. Repeatedly it has been stated in cognate terms that the subject of judi-

cial inquiry, in such a case as this, is whether the statute under consideration "is arbitrary and unreasonable, from the standpoint of natural justice" (*White Case*, p. 202); or "so entravagant or arbitrary as to constitute an abuse of power" (*Mountain Timber Co. Case*, p. 237.) Such was the test applied in determining the validity of the Arizona Act.

There being no claim that any element of public health or of public safety is involved, and no real consideration of public welfare being presented, it follows that the clause in question is fairly to be characterized as unreasonable and fundamentally unjust.

The question here presented is an open one.

Mr. William H. Foster, for plaintiffs in error in Nos. 375 and 376, argued that an award for disfigurement is not compensation but damages (*New York Central R. R. Co.* v. *White*, 243 U. S. 188, 193; *Matter of Erickson* v. *Preuss*, 223 N. Y. 365, 368); and that the previous decisions of this court upholding compensation laws were based on loss of earning power and the tendency of disablement or death of workmen to render them, or their dependents, burdens on the public charity. In this case there was an entire absence of relation between the disfigurement and loss of earning power, though it is probably true that a person who has a disfigurement may have suffered pain and acquired a certain timidity. An award for mere disfigurement is not within the police power as tested by the previous decisions of this court, because the mere disfigurement is not a matter affecting the public interest.

Mr. E. C. Aiken, Deputy Attorney General of the State of New York, with whom *Mr. Charles D. Newton*, Attorney General of the State of New York, was on the briefs, for the State Industrial Commission.

MR. JUSTICE PITNEY delivered the opinion of the court.

The Workmen's Compensation Law of the State of New York (c. 816, Laws 1913, as amended and reënacted by c. 41, Laws 1914; Cons. Laws, c. 67), which was sustained by this court against attacks based upon the Fourteenth Amendment in *New York Central R. R. Co.* v. *White*, 243 U. S. 188, was amended by Laws 1916, c. 622, among other things by inserting in the 15th section, which contains the schedule of compensation for cases of disability, a clause reading as follows: "In case of an injury resulting in serious facial or head disfigurement the commission may in its discretion, make such award or compensation as it may deem proper and equitable, in view of the nature of the disfigurement, but not to exceed three thousand five hundred dollars."

The present writs of error bring up for review three judgments of the Court of Appeals of that State, affirming orders of the Supreme Court, Appellate Division, Third Judicial Department, in which awards based upon this amendment were sustained. The opinion of the Court of Appeals, applicable to all of the cases, is reported under the title of *Matter of Sweeting* v. *American Knife Co.*, 226 N. Y. 199.

In each case the Commission found accidental injuries sustained by an employee in a hazardous occupation, arising out of and in the course of the employment, and, as a result of the injury, some serious facial or head disfigurement, or both. In each case an award was made on account of such disfigurement irrespective of the allowance of compensation according to the schedule based upon the average wage of the injured employee and the character and duration of the disability.

The sole contention here is that the amendment of 1916, as thus carried into effect, deprives the respective plaintiffs

in error of property without due process of law, in contravention of the Fourteenth Amendment.

The argument is that an award for disfigurement, made wholly independent of claimant's inability to work, is not based upon impairment of earning power; that only such impairment can justify imposing upon an employer without fault compulsory payment by way of compensation to an injured workman; and hence that the "disfigurement clause" is not a reasonable exercise of the police power, but is arbitrary and oppressive.

In view of our recent decisions sustaining state laws imposing upon employers in the hazardous industries responsibility in one form or another for the consequences of injuries received by employees in the course of the employment in the absence of fault on the employer's part (*New York Central R. R. Co.* v. *White*, 243 U. S. 188; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219; *Arizona Employers' Liability Cases*, *ante*, 400), little need now be said.

Even were impairment of earning power the sole justification for imposing compulsory payment of workmen's compensation upon the employer in such cases, it would be sufficient answer to the present contention to say that a serious disfigurement of the face or head reasonably may be regarded as having a direct relation to the injured person's earning power, irrespective of its effect upon his mere capacity for work.

Under ordinary conditions of life, a serious and unnatural disfigurement of the face or head very probably may have a harmful effect upon the ability of the injured person to obtain or retain employment. Laying aside exceptional cases, which we must assume will be fairly dealt with in the proper and equitable administration of the act, such a disfigurement may render one repulsive or offensive to the sight, displeasing, or at least less pleasing, to employer, to fellow employees, and to patrons or custom-

ers. See *Ball* v. *Wm. Hunt & Sons, Ltd.*, [1912] App. Cas. 496.

But we cannot concede that impairment of earning power is the sole ground upon which compulsory compensation to injured workmen legitimately may be based. Unquestionably it is a rational basis, and it is adopted for the generality of cases by the New York law. But the Court of Appeals has construed the 1916 amendment as permitting an allowance for facial or head disfigurement although it does not impair the claimant's earning capacity. *Matter of Erickson* v. *Preuss*, 223 N. Y. 365, 368; and see opinion of Judge Cardozo in the present case, 226 N. Y. 199, 200. In view of this, and there being no specific finding of such impairment in these cases, it is proper to say that in our opinion the "due process of law" clause of the Fourteenth Amendment does not require the States to base compulsory compensation solely upon loss of earning power.

The New York law as at first enacted, the Washington, and the Arizona laws presented for our consideration three different methods adopted for the purpose of imposing upon the industry the burden of making some compensation for the human wastage attributable to the hazards of the work. We were unable to find that any of these ran counter to the "due process" clause. Nor does that provision debar a State from adopting other methods, or a composite of different methods, provided the result be not inconsistent with fundamental rights. As was stated in the *Arizona Case, ante*, 429: "If a State recognizes or establishes a right of action for compensation to injured workmen upon grounds not arbitrary or fundamentally unjust, the question whether the award shall be measured as compensatory damages are measured at common law, or according to some prescribed scale reasonably adapted to produce a fair result, is for the State itself to determine." And we see no constitutional reason why a State may not,

in ascertaining the amount of such compensation in particular cases, take into consideration any substantial physical impairment attributable to the injury, whether it immediately affects earning capacity or not.

For the reasons thus outlined, it was not unreasonable, arbitrary, or contrary to fundamental right to embody in the New York Workmen's Compensation Law a provision for a special allowance of compensation for a serious disfigurement of the face or head. Nor is there any ground for declaring that the allowance prescribed by the 1916 amendment exceeds the constitutional limitations upon state power.

Whether an award for such disfigurement should be made in combination with or independent of the compensation allowed for the mere inability to work is a matter of detail for the State to determine. The same is true of the question whether the compensation should be paid in a single sum, or in instalments. *Arizona Employers' Liability Cases, ante,* 400, 429.

Judgments affirmed.

MR. JUSTICE MCREYNOLDS dissents.

BANK OF OXFORD ET AL. *v.* LOVE ET AL., BANK EXAMINERS OF THE STATE OF MISSISSIPPI.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 9. Submitted March 27, 1918; restored to docket for oral argument April 22, 1918; argued October 10, 1919.—Decided November 10, 1919.

A provision in the special charter of a state bank that its business shall be confided to and controlled by its stockholders under such rules as it may adopt, not in conflict with the Constitution of the United

States or of the State, is not inconsistent with the exercise of the general power of the State to cause the affairs of such bank to be examined and reported on by state officials and to exact a reasonable annual assessment (1/40 of 1 per cent. of the total assets) for the maintenance of the state banking department; and a general law, so operating, does not impair the contract obligation of such special charter. P. 606.

111 Mississippi, 699, affirmed.

THE case is stated in the opinion.

Mr. Thos. A. Evans, with whom *Mr. Geo. D. Lancaster*, *Mr. B. L. Mayes* and *Mr. Jas. Stone* were on the brief, for plaintiffs in error.

Mr. Earle N. Floyd, Assistant Attorney General of the State of Mississippi, with whom *Mr. Ross A. Collins*, Attorney General of the State of Mississippi, and *Mr. Robert H. Thompson* were on the brief, for defendants in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

A special act of the Mississippi Legislature, approved March, 1872, incorporated the Bank of Oxford and authorized it to "exercise the privilege appertaining to a general banking, exchange and brokerage business, with all the power of a body corporate." Section IV declares: "That the business of said bank shall be confided to and controlled by its stockholders under such rules of laws and regulations as said Company may see fit to adopt, Provided; the same be not in conflict with the Constitution of the United States or of this State." It was immediately organized, and has continued to carry on business under the charter so granted.

By a comprehensive act containing sixty-nine sections,

approved March 9, 1914, the legislature prescribed general regulations concerning banking. Its scope is fairly indicated by the title, copied below.[1] Section 23 provides: "Each bank subject to the provisions of this act is hereby assessed for each year one-fortieth of one per cent. of its total assets, and the money accruing from said assessment shall be used for the maintenance of the banking department."

After paying one assessment under protest, plaintiff bank, May 14, 1914, instituted this proceeding in the Chancery Court for Hinds County. The original bill sets up and relies upon the charter of 1872 as a contract, protected by the Federal Constitution, which by confiding control to stockholders excludes legislative authority in respect thereto. It alleges: "That the said bank examiners are threatening to interfere with the affairs of this bank, and to exercise such powers as are provided for by said statute [of 1914] over this bank, and are threatening to

[1] "An act establishing a banking department for the State of Mississippi, creating a board of bank commissioners, prescribing their qualifications, duties and compensation, providing for the election of State bank examiners, prescribing their qualifications, duties and compensation, defining what shall constitute a bank and banking business in the State of Mississippi, fixing the capital required to do a banking business, and providing for the examination, regulation and control of banks and banking business conducted by corporations, other than national banks and postal savings banks and fixing the assessment for the revenues of the department, fixing qualifications and liability of officers, stockholders and directors of banking corporations; fixing the qualifications and liability of persons, firms and corporations in the banking business; providing for the payment of deposits to minors and other persons under disability and on joint account; prohibiting banking except under the provisions of this act; providing for the liquidation of banks and the distribution of the assets thereof; providing for giving publicity to deposits more than five years old; and prescribing penalties for the breach of any of the provisions thereof, and to provide a system for guaranteeing deposits, and for other purposes, without expense to the State."

make such examinations and reports upon and about, and to exercise all the other authorities and powers provided for by such statute, over the affairs of your orator, said bank. And your orator pleads hereby, and invokes for such, its contract, immunity from such supervision and control, the said contract clause of the Constitution of the United States, and claims its right exclusively to control and manage the affairs of its own bank." And further: "Your orator protests and shows that it was not subject to the provisions of said banking law, and by its said contract charter, the whole scheme, so devised, as applied to your orator bank, was unconstitutional and void; and your orator shows that for such reason it was not subject to assessment devised and contrived only for the purpose of maintaining such bank department; and your orator was protected against the payment of such assessment, also, by the said contract clause of the Constitution of the United States." The prayer is for an injunction perpetually restraining defendants and their successors from examining or undertaking to enforce as against the complainant any provision contained in the Act of March 9, 1914, and for a decree requiring repayment of the sum assessed and paid under protest.

No argument is required to show that the charter of 1872 constitutes a contract protected by the Federal Constitution. But the construction placed upon § IV by counsel for plaintiffs in error is not tenable. It really contains nothing which purports to take away commonly recognized power of the State to establish such reasonable and general regulations of banks as may be essential to public safety, and to enforce them through a board supported by moderate assessments upon those engaging in the business.

While the bill proceeds upon the theory that the bank's affairs are wholly exempt from interference by legislative direction, the only past or immediately probable wrongs

adequately complained of are enforced contribution to expense of the banking department and threats by defendants to make examinations and reports. And we think it clear that no impairment of the corporate charter has resulted or will result from reasonable examinations and reports by duly authorized officers and the small prescribed payments. It is unnecessary to consider other distinct provisions of the statute, and, of course, we intimate no opinion concerning them.

The Supreme Court of the State affirmed a decree of the Chancery Court dismissing the bill upon demurrer, and its action must be

Affirmed.

GROESBECK ET AL. v. DULUTH, SOUTH SHORE & ATLANTIC RAILWAY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

No. 254. Argued October 15, 1919.—Decided November 10, 1919.

The laws of Michigan prescribing a maximum intrastate passenger fare for railroads whose gross passenger earnings equalled a certain amount per mile required that all lines of a railroad within the State should be treated as a unit in computing such earnings, and in applying the rate limitation. In determining whether the rate was confiscatory in this case—

Held: (1) In the absence of any suggestion of illegality or mismanagement in acquisition or operation, all parts of the railroad's system within the State, profitable or unprofitable, should be embraced in the computation. P. 611.

(2) Unremunerative parts were not to be excluded because built and used primarily for interstate traffic (p. 611), or because not required to supply local transportation needs (p. 612); nor was a reasonable,

though unremunerative, extension of service because furnished by acquiring traffic rights from another company. P. 613.

(3) Sleeping car, parlor car and dining car services should not be treated as separate operations, but the passenger service, including these facilities, must be treated as a whole. *Id.*

(4) In the present state of railroad accounting, what formula should be adopted for dividing charges and expenses common to freight and passenger services and not capable of direct allocation, is a question of fact rather than of law; and the court cannot say that the trial court erred in adopting the method pursued in this case. P. 614.

Affirmed.

THE case is stated in the opinion.

Mr. Leland W. Carr and *Mr. Roger I. Wykes*, with whom *Mr. Alex. J. Groesbeck*, Attorney General of the State of Michigan, was on the brief, for appellants.

Mr. John E. Tracy, with whom *Mr. William D. McHugh* was on the briefs, for appellee.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The constitution of Michigan (Article XII, § 7) authorizes the legislature to pass laws establishing "reasonable maximum rates of charges for the transportation of passengers and freight." In 1907 it fixed two cents a mile as the maximum intrastate passenger fare on railroads operating in the Lower Peninsula and three cents for those in the Upper. By Act approved May 2, 1911 (Public Laws No. 276), the two-cent rate was made applicable to all the railroads of the State whose gross earnings on passenger trains equal or exceed $1,200 per mile of line operated. Before the statute took effect, the Duluth, South Shore and Atlantic Railway Company, an interstate carrier operating in the Upper Peninsula, brought this suit in the District Court of the United States for the Eastern District of

Michigan to enjoin the enforcement of the act. The bill alleged that the reduced rate would deprive plaintiff of its property without due process of law in violation of the Fourteenth Amendment. The Attorney General and the Railroad Commissioners of the State, being charged by the law with its enforcement, were made defendants. They denied that the rate was confiscatory; and on this issue the District Court found for the Railway. A final decree granting the relief sought was filed February 14, 1918; and an appeal to this court was promptly applied for by the defendants and allowed. Meanwhile, on January 1, 1918, the Federal Government had taken over the operation of this and other railroads, and is still operating the same. The two-cent rate was never put into effect on this railroad, as a restraining order issued upon the filing of the bill was continued until entry of the final decree. In 1919 the statute attacked here was repealed (Public Laws No. 382). But the case has not become moot for the following reason: On continuing the restraining order the Railway was required to issue to all intrastate passengers receipts by which it agreed to refund, if the act should be held valid, the amount paid in excess of a two-cent fare. Later the Railway was required to deposit, subject to the order of the court, such amounts thereafter collected. The fund now on deposit exceeds $800,000, and the refund coupons are still outstanding. In order to determine the rights of coupon holders and to dispose of this fund it is necessary to decide whether the Act of 1911 was, as respects this railroad, confiscatory.

The issues of fact were tried below with great thoroughness. The case was referred to a special master to hear the proofs and to report the evidence together with his findings to the court. The report fills 503 pages of the printed record. The transcript of the testimony introduced before him covered more than 12,000 typewritten pages; and there were besides many exhibits. The evidence before the

master related largely to the results of the operation of the railroad for the four years ending June 30, 1913. When the case came on for hearing before the district judge in 1917, supplemental evidence was taken in open court covering the operations of the four additional years ending June 30, 1917. The evidence disclosed the usual diversity of opinion as to the value of the property and as to the proper method of dividing between the passenger and freight services the common expenses and the charges for property used in common. Upon the whole evidence the court found that the two-cent fare would have resulted in a return on intrastate passenger business of less than 2 per cent. during the six years ending June 30, 1917.

Between the commencement of this suit and the entry of the final decree many of the questions in controversy below have been settled by the decisions of this court in other cases.[1] The state officials do not deny that there was legal evidence to justify the findings of fact made by the lower court; nor do they request that this court should undertake a general review of the evidence. But they insist that the finding of the district judge of the low return is erroneous, and that the error is due partly to his having included in his calculations property and operations which

[1] *Interstate Commerce Commission* v. *Union Pacific Ry. Co.*, 222 U. S. 541; *Minnesota Rate Cases*, 230 U. S. 352; *Missouri Rate Cases*, 230 U. S. 474; *Chesapeake & Ohio Ry. Co.* v. *Conley*, 230 U. S. 513; *Oregon R. R. & Nav. Co.* v. *Campbell*, 230 U. S. 525; *Southern Pacific Co.* v. *Campbell*, 230 U. S. 537; *Allen* v. *St. Louis, I. M. & S. Ry. Co.*, 230 U. S. 553; *Missouri Pacific Ry. Co.* v. *Tucker*, 230 U. S. 340; *Wood* v. *Vandalia R. R. Co.*, 231 U. S. 1; *Louisville & Nashville R. R. Co.* v. *Garrett*, 231 U. S. 298; *In re Englehard*, 231 U. S. 646; *San Joaquin, etc., Irrigation Co.* v. *Stanislaus County*, 233 U. S. 454; *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585; *Norfolk & Western Ry. Co.* v. *West Virginia*, 236 U. S. 605; *Missouri* v. *Chicago, B. & Q. R. R. Co.*, 241 U. S. 533; *Rowland* v. *St. Louis & San Francisco R. R. Co.*, 244 U. S. 106; *Darnell* v. *Edwards*, 244 U. S. 564; *Denver* v. *Denver Union Water Co.*, 246 U. S. 178.

should have been excluded, and partly to his having adopted improper formulas for the division of common charges and expenses as between the freight and the passenger services; and that if these specific errors are corrected it will appear that the two-cent fare would have been highly remunerative. These alleged errors must be considered separately.

First: It is contended that the Western Division should be excluded from the calculation. The Duluth, South Shore and Atlantic Railway extends from Sault Ste. Marie to Duluth and has, including branches, 584 miles of line, 475 of which are in Michigan. The Eastern Division serves mainly the iron region; the Central, the copper country; the Western, extending through sparsely settled country from Nestoria, Michigan, 101 miles to the Wisconsin state line, and thence to Duluth, serves mainly interstate business. This division is said to have been built not in a desire to serve local needs, but for the purpose of establishing a through line from Duluth to Sault Ste. Marie. The statement, if true, furnishes no reason for excluding it from the calculation. The cost per mile of transporting passengers varies greatly on different parts of the same railroad system according to circumstances, being dependent, among other things, upon the cost of the roadbed and terminals, the grade, the number and character of the trains, the density of traffic and the length of the haul. The justification for a uniform fare per mile is furnished by the doctrine of averages; and the legislature of Michigan made clear its purpose to apply the doctrine of averages in order to give to travellers the benefit of the two-cent fare on those portions of a railroad on which travel was light and the cost of carrying each passenger necessarily far in excess of two cents a mile. For this act declares: "That in computing the passenger earnings per mile of any company the earnings and mileage of all branch roads owned, leased, controlled or occupied or that may here-

after be owned, leased, controlled or occupied by such company . . . shall be included in the computation; [i. e., determining whether the year's gross passenger earnings equal $1,200 per mile] and the rate of fare shall be the same on all lines owned, leased, controlled or occupied by such company." In other words, the legislature has declared that for the purpose of determining the right of an intrastate passenger to travel on any part of the company's lines at the rate of two cents a mile, all of the lines within the State must be treated as one; that those on which travel is light must be averaged with those on which it is dense; and obviously also that those parts of the system which are unprofitable must be taken with those which are profitable. Every part of the railroad system over which the passenger is entitled by the act to ride for a two-cent fare must be included in the computation undertaken to determine whether the prescribed rate is confiscatory. This is true, at least, in the absence of illegality or mismanagement in the acquisition or operation of the division in question; and of such there is not even a suggestion in the record. There is nothing in *San Diego Land & Town Co.* v. *National City*, 174 U. S. 739, 758, or in *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439, 446, upon which the state officials rely, which is inconsistent with this conclusion.

Second: It is likewise contended that the so-called South Line between Marquette and Ishpeming should be excluded from the calculation. This line which for miles substantially parallels the main line, was originally built as an independent road and was purchased by plaintiff's predecessor in 1884, probably to avoid ruinous competition. It is used mainly for heavy freight, and the intrastate passenger travel over it is light. It is asserted that the construction of this road was not required to supply the transportation needs, and that it would still be possible to carry all existing traffic between Marquette and

Ishpeming over the main line. What has been said above in regard to the Western Division applies equally to the South Line.

Third: It is contended also that a loss was incurred in operating through passenger trains from Houghton over the Mineral Range Railroad to Calumet and that such loss should be excluded from this calculation. This extension of plaintiff's service was clearly reasonable in view of the importance of Calumet, which lies only fourteen miles from its own lines. It was admitted by the state officials that passengers on the route were, under the act, entitled to travel at the two-cent rate. The fact that the service was furnished by acquiring traffic rights instead of by building an independent line, clearly affords no reason for excluding the results of the operation from the calculation.

Fourth: The further contention is made that the sleeping car, parlor car and dining car services should be treated as separate operations; that they should be charged with their proportion of specific and general expenses but credited only with the amounts received from charges for the specific service; and that no part of the apparent loss on these services should be taken into consideration in determining whether the two-cent fare is confiscatory. In support of this contention it is urged that these services were voluntary; that the law (Michigan Public Acts of 1875, No. 38) permits railroads to make special charges for these services "in addition to the regular passenger fares allowed by law," and that travellers in day coaches must not be allowed to suffer because a railroad fails to make these services compensatory. On American railroads of importance these services have been well-nigh universal for more than a generation; and the charges for them are substantially uniform throughout the country. It would be practically impossible, as it would be obviously unwise, for a railroad like the plaintiff's either to discontinue the

services or to increase the charges to cover the cost of the particular service on its line. It is inconceivable that the legislature of Michigan should have intended in enacting the two-cent fare law to deny to its citizens these customary facilities; and for the purpose of determining whether the act is confiscatory the passenger service including these facilities must be treated as a whole. The fact alleged that these facilities are used mainly by interstate travellers is immaterial.

Fifth: The remaining objection relates to the formula adopted by the lower court for dividing charges and expenses common to freight and passenger services, and not capable of direct allocation. What method should be pursued in making such division is a very difficult problem to which railroad accountants, the Interstate Commerce Commission and state railroad commissions have for years given serious attention.[1] Despite much patient study and the exhibition of great ingenuity no wholly satisfactory method has yet been devised. The variables due to local conditions are numerous; and experience teaches us that it is much easier to reject formulas presented as being misleading than to find one apparently

[1] The Interstate Commerce Commission upon its organization July 1, 1887, required the railroads to report operating expenses separately as between the freight and passenger services. The difficulties were so great and the results so widely discredited that the requirement was withdrawn as of June 30, 1894. The requirement was restored as of July 1, 1915. *In the Matter of Separation of Operating Expenses*, 30 I. C. C. 676. In the interval railroad accounting had in this respect made gradual advances. T. M. R. Talcott, Transportation by Rail (1904); *Buel* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 1 Wiscon. R. R. Com. 324 (1907); *Minnesota Rate Cases*, 230 U. S. 352, 458–461 (1912); 14th American Railway Engineering Association Proceedings, pp. 587, 1128–1135 (1913); *Western Passenger Fares*, 37 I. C. C. 1, 12–30 (1915): see M. O. Lorenz Railroad Rate Making, 30 Quarterly Journal of Economics, pp. 221–232 (1916); W. J. Cunningham, The Separation of Railroad Operating Expenses between Freight and Passenger Services, 31 Quarterly Journal of Economics, pp. 200–249 (1917).

adequate. The science of railroad accounting is in this respect in process of development; and it may be long before a formula is devised which can be accepted as satisfactory. For the present, at least, the question what formula the trial court should adopt presents a question, not of law, but of fact; and we are clearly unable to say that the lower court erred in adopting the method there pursued.[1]

The decree of the District Court is

Affirmed.

[1] The average rate of return for the years 1914–1917 according to the formula adopted by the trial judge was 1.20%. By the use of a formula more favorable to the defendant he found it to be 2.52%. The modified revenue train mile ratio used by the plaintiff showed a loss of over $100,000 a year; while the gross ton mile ratio proposed by the defendant indicated an average return of at most 5.82%. Of these methods employed by the parties it may be noted that the Interstate Commerce Commission has said:

"The representatives of the state commissions advocated the use of 'gross-ton-miles' as a basis, while the representatives of the railways favored 'engine-ton-miles.' The discussion seemed to be somewhat influenced by the possible effect of these respective bases on statistical evidence which might be introduced in passenger rate cases. It may fairly be said that the facts and arguments presented do not warrant the final approval by the Commission of either the gross-ton-mile or the locomotive-ton-mile at this time." *Rules Governing the Separation of Operating Expenses Between Freight Service and Passenger Service on Large Steam Railways, Effective July 1, 1915, p. 3.* These rules are now in process of revision.

ABRAMS ET AL. *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 316. Argued October 21, 22, 1919.—Decided November 10, 1919.

Evidence sufficient to sustain any one of several counts of an indictment will sustain a verdict and judgment of guilty under all, if the sentence does not exceed that which might lawfully have been imposed under any single count. P. 619.

Evidence *held* sufficient to sustain a conviction of conspiracy to violate the Espionage Act by uttering, etc., circulars intended to provoke and encourage resistance to the United States in the war with Germany, and by inciting and advocating, through such circulars, resort to a general strike of workers in ammunition factories for the purpose of curtailing production of ordnance and munitions essential to the prosecution of the war. P. 619, *et seq.*

When prosecuted under the Espionage Act, persons who sought to effectuate a plan of action which necessarily, before it could be realized, involved the defeat of the plans of the United States for the conduct of the war with Germany, must be held to have intended that result notwithstanding their ultimate purpose may have been to prevent interference with the Russian Revolution. P. 621.

Affirmed.

THE case is stated in the opinion.

Mr. Harry Weinberger for plaintiffs in error.

Mr. Assistant Attorney General Stewart, with whom *Mr. W. C. Herron* was on the brief, for the United States.

MR. JUSTICE CLARKE delivered the opinion of the court.

On a single indictment, containing four counts, the five plaintiffs in error, hereinafter designated the defendants, were convicted of conspiring to violate provisions of the

Espionage Act of Congress (§ 3, Title I, of Act approved June 15, 1917, as amended May 16, 1918, 40 Stat. 553).

Each of the first three counts charged the defendants with conspiring, when the United States was at war with the Imperial Government of Germany, to unlawfully utter, print, write and publish: In the first count, "disloyal, scurrilous and abusive language about the form of Government of the United States;" in the second count, language "intended to bring the form of Government of the United States into contempt, scorn, contumely and disrepute;" and in the third count, language "intended to incite, provoke and encourage resistance to the United States in said war." The charge in the fourth count was that the defendants conspired "when the United States was at war with the Imperial German Government, . . . unlawfully and wilfully, by utterance, writing, printing and publication, to urge, incite and advocate curtailment of production of things and products, to wit, ordnance and ammunition, necessary and essential to the prosecution of the war." The offenses were charged in the language of the act of Congress.

It was charged in each count of the indictment that it was a part of the conspiracy that the defendants would attempt to accomplish their unlawful purpose by printing, writing and distributing in the City of New York many copies of a leaflet or circular, printed in the English language, and of another printed in the Yiddish language, copies of which, properly identified, were attached to the indictment.

All of the five defendants were born in Russia. They were intelligent, had considerable schooling, and at the time they were arrested they had lived in the United States terms varying from five to ten years, but none of them had applied for naturalization. Four of them testified as witnesses in their own behalf and of these, three frankly avowed that they were "rebels," "revolution-

ists," "anarchists," that they did not believe in government in any form, and they declared that they had no interest whatever in the Government of the United States. The fourth defendant testified that he was a "socialist" and believed in "a proper kind of government, not capitalistic," but in his classification the Government of the United States was "capitalistic."

It was admitted on the trial that the defendants had united to print and distribute the described circulars and that five thousand of them had been printed and distributed about the 22d day of August, 1918. The group had a meeting place in New York City, in rooms rented by defendant Abrams, under an assumed name, and there the subject of printing the circulars was discussed about two weeks before the defendants were arrested. The defendant Abrams, although not a printer, on July 27, 1918, purchased the printing outfit with which the circulars were printed and installed it in a basement room where the work was done at night. The circulars were distributed some by throwing them from a window of a building where one of the defendants was employed and others secretly, in New York City.

The defendants pleaded "not guilty," and the case of the Government consisted in showing the facts we have stated, and in introducing in evidence copies of the two printed circulars attached to the indictment, a sheet entitled "Revolutionists Unite for Action," written by the defendant Lipman, and found on him when he was arrested, and another paper, found at the headquarters of the group, and for which Abrams assumed responsibility.

Thus the conspiracy and the doing of the overt acts charged were largely admitted and were fully established.

On the record thus described it is argued, somewhat faintly, that the acts charged against the defendants were not unlawful because within the protection of that freedom

of speech and of the press which is guaranteed by the First Amendment to the Constitution of the United States, and that the entire Espionage Act is unconstitutional because in conflict with that Amendment.

This contention is sufficiently discussed and is definitely negatived in *Schenck* v. *United States* and *Baer* v. *United States*, 249 U. S. 47; and in *Frohwerk* v. *United States*, 249 U. S. 204.

The claim chiefly elaborated upon by the defendants in the oral argument and in their brief is that there is no substantial evidence in the record to support the judgment upon the verdict of guilty and that the motion of the dedendants for an instructed verdict in their favor was erroneously denied. A question of law is thus presented, which calls for an examination of the record, not for the purpose of weighing conflicting testimony, but only to determine whether there was some evidence, competent and substantial, before the jury, fairly tending to sustain the verdict. *Troxell* v. *Delaware, Lackawanna & Western R. R. Co.*, 227 U. S. 434, 442; *Lancaster* v. *Collins*, 115 U. S. 222, 225; *Chicago & Northwestern Ry. Co.* v. *Ohle*, 117 U. S. 123, 129. We shall not need to consider the sufficiency, under the rule just stated, of the evidence introduced as to all of the counts of the indictment, for, since the sentence imposed did not exceed that which might lawfully have been imposed under any single count, the judgment upon the verdict of the jury must be affirmed if the evidence is sufficient to sustain any one of the counts. *Evans* v. *United States*, 153 U. S. 608; *Claassen* v. *United States*, 142 U. S. 140; *Debs* v. *United States*, 249 U. S. 211, 216.

The first of the two articles attached to the indictment is conspicuously headed, "The Hypocrisy of the United States and her Allies." After denouncing President Wilson as a hypocrite and a coward because troops were sent into Russia, it proceeds to assail our Government in general, saying:

"His [the President's] shameful, cowardly silence about the intervention in Russia reveals the hypocrisy of the plutocratic gang in Washington and vicinity."

It continues:

"He [the President] is too much of a coward to come out openly and say: 'We capitalistic nations cannot afford to have a proletarian republic in Russia.'"

Among the capitalistic nations Abrams testified the United States was included.

Growing more inflammatory as it proceeds, the circular culminates in:

"The Russian Revolution cries: Workers of the World! Awake! Rise! Put down your enemy and mine!

"Yes! friends, there is only one enemy of the workers of the world and that is CAPITALISM."

This is clearly an appeal to the "workers" of this country to arise and put down by force the Government of the United States which they characterize as their "hypocritical," "cowardly" and "capitalistic" enemy.

It concludes:

"Awake! Awake, you Workers of the World!

"REVOLUTIONISTS."

The second of the articles was printed in the Yiddish language and in the translation is headed, "Workers—Wake up." After referring to "his Majesty, Mr. Wilson, and the rest of the gang; dogs of all colors!", it continues:

"Workers, Russian emigrants, you who had the least belief in the honesty of *our* Government," which defendants admitted referred to the United States Government, "must now throw away all confidence, must spit in the face the false, hypocritic, military propaganda which has fooled you so relentlessly, calling forth your sympathy, your help, to the prosecution of the war."

The purpose of this obviously was to persuade the persons to whom it was addressed to turn a deaf ear to patri-

otic appeals in behalf of the Government of the United States, and to cease to render it assistance in the prosecution of the war.

It goes on:

"With the money which you have loaned, or are going to loan them, they will make bullets not only for the Germans, but also for the Workers Soviets of Russia. *Workers in the ammunition factories, you are producing bullets, bayonets, cannon, to murder not only the Germans, but also your dearest, best, who are in Russia and are fighting for freedom.*"

It will not do to say, as is now argued, that the only intent of these defendants was to prevent injury to the Russian cause. Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce. Even if their primary purpose and intent was to aid the cause of the Russian Revolution, the plan of action which they adopted necessarily involved, before it could be realized, defeat of the war program of the United States, for the obvious effect of this appeal, if it should become effective, as they hoped it might, would be to persuade persons of character such as those whom they regarded themselves as addressing, not to aid government loans and not to work in ammunition factories, where their work would produce "bullets, bayonets, cannon" and other munitions of war, the use of which would cause the "murder" of Germans and Russians.

Again, the spirit becomes more bitter as it proceeds to declare that —

"America and her Allies have betrayed (the Workers). Their robberish aims are clear to all men. The destruction of the Russian Revolution, that is the politics of the march to Russia.

"*Workers, our reply to the barbaric intervention has to be a general strike! An open challenge* only will let the Government know that not only the Russian Worker fights for

freedom, but also *here in America lives the spirit of Revolution.*"

This is not an attempt to bring about a change of administration by candid discussion, for no matter what may have incited the outbreak on the part of the defendant anarchists, the manifest purpose of such a publication was to create an attempt to defeat the war plans of the Government of the United States, by bringing upon the country the paralysis of a general strike, thereby arresting the production of all munitions and other things essential to the conduct of the war.

This purpose is emphasized in the next paragraph, which reads:

"Do not let the Government scare you with their wild punishment in prisons, hanging and shooting. We must not and will not betray the splendid fighters of Russia. *Workers, up to fight.*"

After more of the same kind, the circular concludes:

"Woe unto those who will be in the way of progress. Let solidarity live!"

It is signed, "The Rebels."

That the interpretation we have put upon these articles, circulated in the greatest port of our land, from which great numbers of soldiers were at the time taking ship daily, and in which great quantities of war supplies of every kind were at the time being manufactured for transportation overseas, is not only the fair interpretation of them, but that it is the meaning which their authors consciously intended should be conveyed by them to others is further shown by the additional writings found in the meeting place of the defendant group and on the person of one of them. One of these circulars is headed: "Revolutionists! Unite for Action!"

After denouncing the President as "Our Kaiser" and the hypocrisy of the United States and her Allies, this article concludes:

"Socialists, Anarchists, Industrial Workers of the World, Socialists, Labor party men and other revolutionary organizations *Unite for action* and let us save the Workers' Republic of Russia!

"*Know you lovers of freedom that in order to save the Russian revolution, we must keep the armies of the allied countries busy at home.*"

Thus was again avowed the purpose to throw the country into a state of revolution if possible and to thereby frustrate the military program of the Government.

The remaining article, after denouncing the President for what is characterized as hostility to the Russian revolution, continues:

"We, the toilers of America, who believe in real liberty, shall *pledge ourselves*, in case the United States will participate in that bloody conspiracy against Russia, *to create so great a disturbance that the autocrats of America shall be compelled to keep their armies at home, and not be able to spare any for Russia.*"

It concludes with this definite threat of armed rebellion:

"If they will use arms against the Russian people to enforce their standard of order, *so will we use arms*, and they shall never see the ruin of the Russian Revolution."

These excerpts sufficiently show, that while the immediate occasion for this particular outbreak of lawlessness, on the part of the defendant alien anarchists, may have been resentment caused by our Government sending troops into Russia as a strategic operation against the Germans on the eastern battle front, yet the plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country for the purpose of embarrassing and if possible defeating the military plans of the Government in Europe. A technical distinction may perhaps be taken between disloyal and abusive language applied to the *form* of our government or language intended to bring the *form*

of our government into contempt and disrepute, and language of like character and intended to produce like results directed against the President and Congress, the agencies through which that form of government must function in time of war. But it is not necessary to a decision of this case to consider whether such distinction is vital or merely formal, for the language of these circulars was obviously intended to provoke and to encourage resistance to the United States in the war, as the third count runs, and, the defendants, in terms, plainly urged and advocated a resort to a general strike of workers in ammunition factories for the purpose of curtailing the production of ordnance and munitions necessary and essential to the prosecution of the war as is charged in the fourth count. Thus it is clear not only that some evidence but that much persuasive evidence was before the jury tending to prove that the defendants were guilty as charged in both the third and fourth counts of the indictment and under the long established rule of law hereinbefore stated the judgment of the District Court must be

Affirmed.

MR. JUSTICE HOLMES dissenting.

This indictment is founded wholly upon the publication of two leaflets which I shall describe in a moment. The first count charges a conspiracy pending the war with Germany to publish abusive language about the form of government of the United States, laying the preparation and publishing of the first leaflet as overt acts. The second count charges a conspiracy pending the war to publish language intended to bring the form of government into contempt, laying the preparation and publishing of the two leaflets as overt acts. The third count alleges a conspiracy to encourage resistance to the United States in the same war and to attempt to effectuate the purpose by publishing the same leaflets. The fourth count lays a con-

spiracy to incite curtailment of production of things necessary to the prosecution of the war and to attempt to accomplish it by publishing the second leaflet to which I have referred.

The first of these leaflets says that the President's cowardly silence about the intervention in Russia reveals the hypocrisy of the plutocratic gang in Washington. It intimates that "German militarism combined with allied capitalism to crush the Russian revolution"—goes on that the tyrants of the world fight each other until they see a common enemy—working class enlightenment, when they combine to crush it; and that now militarism and capitalism combined, though not openly, to crush the Russian revolution. It says that there is only one enemy of the workers of the world and that is capitalism; that it is a crime for workers of America, &c., to fight the workers' republic of Russia, and ends "Awake! Awake, you Workers of the World! Revolutionists." A note adds "It is absurd to call us pro-German. We hate and despise German militarism more than do you hypocritical tyrants. We have more reasons for denouncing German militarism than has the coward of the White House."

The other leaflet, headed "Workers—Wake Up," with abusive language says that America together with the Allies will march for Russia to help the Czecko-Slovaks in their struggle against the Bolsheviki, and that this time the hypocrites shall not fool the Russian emigrants and friends of Russia in America. It tells the Russian emigrants that they now must spit in the face of the false military propaganda by which their sympathy and help to the prosecution of the war have been called forth and says that with the money they have lent or are going to lend "they will make bullets not only for the Germans but also for the Workers Soviets of Russia," and further, "Workers in the ammunition factories, you are producing bullets, bayonets, cannon, to murder not only the Ger-

mans, but also your dearest, best, who are in Russia and are fighting for freedom." It then appeals to the same Russian emigrants at some length not to consent to the "inquisitionary expedition to Russia," and says that the destruction of the Russian revolution is "the politics of the march to Russia." The leaflet winds up by saying "Workers, our reply to this barbaric intervention has to be a general strike!," and after a few words on the spirit of revolution, exhortations not to be afraid, and some usual tall talk ends "Woe unto those who will be in the way of progress. Let solidarity live! The Rebels."

No argument seems to me necessary to show that these pronunciamentos in no way attack the form of government of the United States, or that they do not support either of the first two counts. What little I have to say about the third count may be postponed until I have considered the fourth. With regard to that it seems too plain to be denied that the suggestion to workers in the ammunition factories that they are producing bullets to murder their dearest, and the further advocacy of a general strike, both in the second leaflet, do urge curtailment of production of things necessary to the prosecution of the war within the meaning of the Act of May 16, 1918, c. 75, 40 Stat. 553, amending § 3 of the earlier Act of 1917. But to make the conduct criminal that statute requires that it should be "with intent by such curtailment to cripple or hinder the United States in the prosecution of the war." It seems to me that no such intent is proved.

I am aware of course that the word intent as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law might be hanged, if at the time of his act

he knew facts from which common experience showed that the consequences would follow, whether he individually could foresee them or not. But, when words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind.

It seems to me that this statute must be taken to use its words in a strict and accurate sense. They would be absurd in any other. A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet even if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime. I admit that my illustration does not answer all that might be said but it is enough to show what I think and to let me pass to a more important aspect of the case. I refer to the First Amendment to the Constitution that Congress shall make no law abridging the freedom of speech.

I never have seen any reason to doubt that the questions of law that alone were before this Court in the cases of *Schenck*, *Frohwerk* and *Debs*, 249 U. S. 47, 204, 211, were rightly decided. I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is

greater in time of war than in time of peace because war opens dangers that do not exist at other times.

But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so. Publishing those opinions for the very purpose of obstructing however, might indicate a greater danger and at any rate would have the quality of an attempt. So I assume that the second leaflet if published for the purposes alleged in the fourth count might be punishable. But it seems pretty clear to me that nothing less than that would bring these papers within the scope of this law. An actual intent in the sense that I have explained is necessary to constitute an attempt, where a further act of the same individual is required to complete the substantive crime, for reasons given in *Swift & Co.* v. *United States*, 196 U. S. 375, 396. It is necessary where the success of the attempt depends upon others because if that intent is not present the actor's aim may be accomplished without bringing about the evils sought to be checked. An intent to prevent interference with the revolution in Russia might have been satisfied without any hindrance to carrying on the war in which we were engaged.

I do not see how anyone can find the intent required by the statute in any of the defendants' words. The second leaflet is the only one that affords even a foundation for the charge, and there, without invoking the hatred of German militarism expressed in the former one, it is evi-

dent from the beginning to the end that the only object of the paper is to help Russia and stop American intervention there against the popular government—not to impede the United States in the war that it was carrying on. To say that two phrases taken literally might import a suggestion of conduct that would have interference with the war as an indirect and probably undesired effect seems to me by no means enough to show an attempt to produce that effect.

I return for a moment to the third count. That charges an intent to provoke resistance to the United States in its war with Germany. Taking the clause in the statute that deals with that in connection with the other elaborate provisions of the act, I think that resistance to the United States means some forcible act of opposition to some proceeding of the United States in pursuance of the war. I think the intent must be the specific intent that I have described and for the reasons that I have given I think that no such intent was proved or existed in fact. I also think that there is no hint at resistance to the United States as I construe the phrase.

In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them. Even if I am technically wrong and enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper; I will add, even if what I think the necessary intent were shown; the most nominal punishment seems to me all that possibly could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow—a creed that I believe to be the creed of ignorance and immaturity when honestly held, as I see no reason to doubt that it was held here, but which, although made the subject of examination at the

trial, no one has a right even to consider in dealing with the charges before the Court.

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants

making any exception to the sweeping command, "Congress shall make no law . . . abridging the freedom of speech." Of course I am speaking only of expressions of opinion and exhortations, which were all that were uttered here, but I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States.

MR. JUSTICE BRANDEIS concurs with the foregoing opinion.

DECISIONS PER CURIAM, FROM MAY 19, 1919, TO JUNE 9, 1919, NOT INCLUDING ACTION ON PETITIONS FOR WRITS OF CERTIORARI.

No. 136. L. CASS MILLER ET AL. *v.* JOHN WIETHAUPT ET AL. Appeal from the District Court of the United States for the Eastern District of Missouri. Submitted April 24, 1919. Decided May 19, 1919. *Per Curiam.* Affirmed upon the authority of *State ex rel. Clay County* v. *Hackman*, 270 Missouri, 658. *Mr. Thomas K. Skinker* for appellants. *Mr. Richard F. Ralph* and *Mr. Charles A. Houts* for appellees.

No. 205. UNITED STATES *v.* A. H. HEYWARD ET AL., ADMINISTRATORS, ETC. Appeal from the Court of Claims. Argued January 31, 1919. Decided May 19, 1919. *Per Curiam.* Judgment affirmed by an equally divided court. *The Solicitor General* for the United States. *Mr. E. C. Brandenburg*, with whom *Mr. W. Boyd Evans* and *Mr. F. W. Brandenburg* were on the brief, for appellees.

No. 689. SILAS WHITE *v.* UNITED STATES. Error to the District Court of the United States for the District of Nebraska. Motion to dismiss submitted April 21, 1919. Decided May 19, 1919. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of: (1) *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 314; *Consolidated Turnpike Co.* v. *Norfolk, &c. Ry. Co.*, 228 U. S. 596, 600; *Manhattan Life Ins. Co.* v. *Cohen*, 234 U. S. 123, 137; *Pennsylvania Hospital* v. *Philadelphia*, 245 U. S. 20, 24. (2) *United States* v. *Kagama*, 118 U. S. 375; *United States* v. *Celestine*, 215 U. S. 278; *Donnelly* v.

United States, 228 U. S. 243, 270; *United States* v. *Sandoval*, 231 U. S. 28, 39; *United States* v. *Nice*, 241 U. S. 591. *Mr. Thomas L. Sloan* for plaintiff in error. *The Solicitor General* for the United States.

No. ——, Original. *Ex parte:* IN THE MATTER OF CLARENCE L. ZIEGLER, PETITIONER. Submitted May 5, 1919. Decided May 19, 1919. Motion for leave to file a petition for a writ of *habeas corpus* herein denied. *Mr. J. H. Adrians* for petitioner.

No. 349. DANIEL DONAHOE *v.* PEOPLE OF THE STATE OF ILLINOIS. Error to the Supreme Court of the State of Illinois. Motion to dismiss submitted May 19, 1919. Decided June 2, 1919. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of *McCain* v. *Des Moines*, 174 U. S. 168, 181; *Western Union Telegraph Co.* v. *Ann Arbor R. R. Co.*, 178 U. S. 239, 243; *Hull* v. *Burr*, 234 U. S. 712, 720; *Norton* v. *Whiteside*, 239 U. S. 144, 147. Petition for certiorari denied. *Mr. Leo L. Donahoe* for plaintiff in error. *Mr. Edward J. Brundage* for defendant in error.

No. 240. JOHN D. FAXON *v.* CIVIL TOWNSHIP OF LALLIE, BENSON COUNTY, NORTH DAKOTA. Error to the Supreme Court of the State of North Dakota. Argued March 17, 18, 1919. Decided June 2, 1919. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726. *Mr. S. E. Ellsworth* for plaintiff in error. *Mr. Edward T. Burke*, with

whom *Mr. C. L. Young* was on the brief, for defendant in error.

No. —, Original. *Ex parte:* IN THE MATTER OF W. GORDON MCCABE, JR., ET AL., PETITIONERS. Submitted May 19, 1919. Decided June 2, 1919. Motion for leave to file petition for a writ of mandamus denied. *Mr. William St. John Tozer* for petitioners. *Mr. Emanuel J. Meyers* and *Mr. Gordon S. P. Kleeberg* opposing.

No. —. ELBERT R. ROBINSON *v.* CHICAGO CITY RAILWAY COMPANY ET AL. Motion for an appeal submitted May 19, 1919. Denied June 2, 1919. *Mr. Solomon T. Clanton* for Robinson.

No. 732. CHARLES EDWIN LAYTON, ALIAS FRANCIS EDWIN LEIGHTON, ETC., *v.* UNITED STATES. Error to the District Court of the United States for the Southern District of Iowa. Motion to dismiss submitted June 2, 1919. Decided June 9, 1919. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Pickett* v. *Legerwood*, 7 Pet. 144, 148; *United States* v. *Abatoir Place*, 106 U. S. 160, 162. *Mr. Isaac B. Kimbrell* and *Mr. Martin J. O'Donnell* for plaintiff in error. *The Solicitor General* for the United States.

No. 894. EARL DEAR *v.* PEOPLE OF THE STATE OF ILLINOIS. Error to the Supreme Court of the State of Illinois. Motion to dismiss submitted June 2, 1919. Decided June 9, 1919. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Spencer* v.

Duplan Silk Co., 191 U. S. 526, 530; *Shulthis* v. *McDougal*, 225 U. S. 561, 569; *Hull* v. *Burr*, 234 U. S. 712, 720; *Norton* v. *Whiteside*, 239 U. S. 144, 147. *Mr. Emory J. Smith* and *Mr. Charles C. Williams* for plaintiff in error. *Mr. Edward J. Brundage* and *Mr. Edward C. Fitch* for defendant in error.

No. —, Original. *Ex parte:* IN THE MATTER OF CHARLES C. FOSTER, ACTING SUPERINTENDENT OF THE WASHINGTON ASYLUM AND JAIL, PETITIONER. Submitted June 2, 1919. Decided June 9, 1919. Petition for the allowance of an appeal herein denied. *The Solicitor General* for petitioner.

No. —, Original. *Ex parte:* IN THE MATTER OF THE BALDWIN COMPANY ET AL., PETITIONERS. Submitted June 2, 1919. Decided June 9, 1919. Petition for the allowance of an appeal herein granted. *Mr. Lawrence Maxwell* and *Mr. John E. Cross* for petitioners.

DECISIONS ON PETITIONS FOR WRITS OF CERTIORARI, FROM MAY 19, 1919, TO JUNE 9, 1919.

(A.) PETITIONS GRANTED.[1]

No. 986. ERIE RAILROAD COMPANY *v.* ANTONIO SZARY. May 19, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. William C. Cannon* for petitioner. *Mr. John C. Robinson* for respondent.

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[1] For petitions denied, see *post*, 639.

No. 971. ERIE RAILROAD COMPANY *v.* WILLIAM M. COLLINS. May 19, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Adelbert Moot* for petitioner. *Mr. Hamilton Ward* for respondent.

No. 1003. GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY *v.* L. H. WOODBURY ET AL. June 9, 1919. Petition for a writ of certiorari to the Court of Civil Appeals for the Eighth Supreme Judicial District of the State of Texas granted. *Mr. T. J. Beall* for petitioner. *Mr. Rufus B. Daniel* for respondents.

No. 1007. COCA-COLA COMPANY *v.* KOKE COMPANY OF AMERICA ET AL. June 9, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. F. W. Lehmann, Mr. Harold Hirsch, Mr. Edward S. Rogers* and *Mr. Frank F. Reed* for petitioner. *Mr. C. L. Parker* and *Mr. Richard E. Sloan* for respondents.

No. 1019. ROBERT B. BROWN *v.* UNITED STATES. June 9, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. W. E. Pope, Mr. E. C. Brandenburg* and *Mr. H. S. Bonham* for petitioner. *Mr. Assistant Attorney General Porter* and *Mr. W. C. Herron* for the United States.

No. 1029. PERE MARQUETTE RAILWAY COMPANY *v.* J. F. FRENCH & COMPANY. June 9, 1919. Petition for a

writ of certiorari to the Supreme Court of the State of Michigan granted. *Mr. Oscar E. Waer* and *Mr. John C. Shields* for petitioner. *Mr. Clare J. Hall* for respondent.

No. 1031. J. HARTLEY MANNERS *v.* OLIVER MOROSCO. June 9, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Walter C. Noyes, Mr. David Gerber* and *Mr. Wm. J. Hughes* for petitioner. *Mr. Charles H. Tuttle* for respondent.

No. 1034. SOUTHERN PACIFIC COMPANY *v.* W. S. BERKSHIRE, TEMPORARY ADMINISTRATOR, ETC. June 9, 1919. Petition for a writ of certiorari to the Court of Civil Appeals for the Eighth Supreme Judicial District of the State of Texas granted. *Mr. William I. Gilbert* and *Mr. William F. Herrin* for petitioner. No appearance for respondent.

No. 1036. STRATHEARN STEAMSHIP COMPANY, LIMITED, *v.* JOHN DILLON. June 9, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Ralph James M. Bullowa* for petitioner. *Mr. Silas B. Axtell* and *Mr. W. J. Waguespack* for respondent. *Mr. Frederic R. Coudert* and *Mr. Howard Thayer Kingsbury* as *amici curiæ.*

No. 1047. NATIONAL BRAKE & ELECTRIC COMPANY *v.* NEILS A. CHRISTENSEN ET AL. June 9, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. John S. Miller, Mr.*

Thomas B. Kerr, Mr. Charles A. Brown and *Mr. Edward Osgood Brown* for petitioner. *Mr. Joseph B. Cotton, Mr. Willet M. Spooner, Mr. Louis Quarles* and *Mr. William R. Rummler* for respondents.

No. 1052. BROOKS-SCANLON COMPANY *v.* RAILROAD COMMISSION OF LOUISIANA. June 9, 1919. Petition for a writ of certiorari to the Supreme Court of the State of Louisiana granted. *Mr. J. Blanc Monroe* and *Mr. Monte M. Lemann* for petitioner. *Mr. W. M. Barrow* for respondent.

No. 1059. J. M. THOMPSON, MASTER AND CLAIMANT, ETC., *v.* PETER LUCAS, ET AL. June 9, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. John M. Woolsey* and *Mr. L. DeGrove Potter* for petitioner. No appearance for respondents.

(B.) PETITIONS DENIED.

No. 944. SOUTHERN PACIFIC COMPANY *v.* LEO L. D'UTASSY. Error to the Supreme Court of the State of New York. May 19, 1919. Petition for a writ of certiorari herein denied. *Mr. Fred H. Wood,* for plaintiff in error, in support of the petition. *Mr. Wilson E. Tipple* and *Mr. Arthur W. Clement,* for defendant in error, in opposition to the petition.

No. 970. THE TUG INTERNATIONAL, HER ENGINES, ETC., ET AL. *v.* WILLIAM L. MCFADDEN ET AL. May 19,

1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Adelbert Moot* for petitioners. *Mr. Lester F. Gilbert* for respondents.

No. 988. JAMES GRAY, TRUSTEE, ETC., *v.* ELLA L. MOORE. May 19, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Harry H. Schutte* for petitioner. *Mr. Andrew J. Nellis* for respondent.

No. 989. JAMES GRAY, TRUSTEE, ETC., *v.* JOSIE G. HANRAHAN. May 19, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Harry H. Schutte* for petitioner. *Mr. Andrew J. Nellis* for respondent.

No. 990. CITY OF OMAHA, IN THE STATE OF NEBRASKA, *v.* OMAHA ELECTRIC LIGHT & POWER COMPANY. May 19, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. William C. Lambert* for petitioner. *Mr. William D. McHugh* for respondent.

No. 991. PARLIN & ORENFDORFF IMPLEMENT COMPANY *v.* MRS. LEONA FREY. May 19, 1919. Petition for a writ of certiorari to the Court of Civil Appeals for the Sixth Supreme Judicial District of the State of Texas denied. *Mr. Joseph Manson McCormick* and *Mr. Francis Marion Etheridge* for petitioner. No appearance for respondent.

No. 349. DANIEL DONAHOE *v.* PEOPLE OF THE STATE OF ILLINOIS. See *ante*, 634.

No. 926. ADOLPH LIPMAN *v.* ABRAHAM SLIMMER, JR., ET AL. June 2, 1919. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota denied. *Mr. Louis H. Salinger* for petitioner. *Mr. Thomas D. O'Brien, Mr. Edward T. Young* and *Mr. Alexander E. Horn* for respondents.

No. 965. MINERAL DEVELOPMENT COMPANY *v.* KENTUCKY COAL LANDS COMPANY. June 2, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. J. F. Bullitt, Mr. E. L. Worthington, Mr. W. B. Dixon* and *Mr. S. B. Dishman* for petitioner. *Mr. Edward C. O'Rear, Mr. Edward E. Barthell* and *Mr. Henry Fitts* for respondent.

No. 997. CHESTER A. SNOW *v.* ADDIS H. SNOW. June 2, 1919. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Frederic D. McKenney* and *Mr. Geo. P. Hoover* for petitioner. *Mr. Henry E. Davis* for respondent.

No. 1001. GULF, COLORADO & SANTA FE RAILWAY COMPANY *v.* MRS. E. B. CARPENTER, ADMINISTRATRIX, ETC. June 2, 1919. Petition for a writ of certiorari to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas denied. *Mr. Evans Browne* and *Mr. J. W. Terry* for petitioner. *Mr. Winbourne Pearce* and *Mr. A. L. Curtis* for respondent.

No. 1005. GUARANTY TRUST COMPANY OF NEW YORK *v.* CHATHAM & PHENIX NATIONAL BANK OF THE CITY OF NEW YORK. June 2, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Frank M. Patterson* for petitioner. *Mr. David L. Podell* for respondent.

No. 1012. RENNSSELAER & SARATOGA RAILROAD COMPANY *v.* DELAWARE & HUDSON COMPANY, IMPLEADED WITH ROSCOE IRWIN, COLLECTOR, ETC. June 2, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George B. Wellington* for petitioner. No appearance for respondent.

No. 1013. HARVEY D. APGAR *v.* UNITED STATES. June 2, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John C. Theus* for petitioner. *Mr. Assistant Attorney General Porter* for the United States.

No. 1014. PHILIP F. DUPONT ET AL. *v.* PIERRE S. DUPONT ET AL. June 2, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Wm. A. Glasgow, Jr.*, *Mr. Henry P. Brown* and *Mr. Robert Pennington* for petitioners. *Mr. George S. Graham*, *Mr. George W. Pepper* and *Mr. William H. Button* for respondents.

No. 1002. SOUTH DAKOTA CENTRAL RAILWAY COMPANY *v.* CONTINENTAL & COMMERCIAL TRUST & SAVINGS

BANK ET AL. June 9, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Tore Teigen* for petitioner. No appearance for respondents.

No. 1008. SANTA MARINA COMPANY *v.* CANADIAN BANK OF COMMERCE. June 9, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Edward W. McGraw* for petitioner. *Mr. Gavin McNabb, Mr. Nat Schmulowitz* and *Mr. R. P. Henshaw* for respondent.

No. 1010. GULF, COLORADO & SANTA FE RAILWAY COMPANY *v.* UNITED STATES. June 9, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Evans Browne, Mr. Alexander Britton* and *Mr. J. W. Terry* for petitioner. *Mr. Assistant Attorney General Frierson* for the United States.

No. 1011. J. W. PRALL, ADMINISTRATOR, ETC., *v.* GREAT NORTHERN RAILWAY COMPANY. June 9, 1919. Petition for a writ of certiorari to the Supreme Court of the State of Washington denied. *Mr. E. M. Heyburn* for petitioner. *Mr. M. L. Countryman* and *Mr. F. V. Brown* for respondent.

No. 1015. GENERAL FIREPROOFING COMPANY *v.* BRECKENRIDGE JONES, TRUSTEE, ETC., ET AL. June 9, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Charles Neave,*

Mr. W. K. Richardson and *Mr. F. L. Chappell* for petitioner. *Mr. W. H. Dyrenforth* and *Mr. George A Chritton* for respondents.

No. 1016. JOSE DE GUZMAN ET AL. *v.* FAUSTINO LICHAUCO. June 9, 1919. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. Richard Campbell* and *Mr. Felipe Buencamino, Jr.*, for petitioners. *Mr. Alexander Britton* and *Mr. Evans Browne* for respondent.

No. 1017. LORA MCCRAY *v.* WEST HELENA CONSOLIDATED COMPANY. June 9, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Charles C. Reid* for petitioner. *Mr. W. E. Hemingway, Mr. G. B. Rose, Mr. D. H. Cantrell* and *Mr. J. F. Loughborough* for respondent.

No. 1018. ASBESTOS & RUBBER WORKS OF AMERICA, INC., *v.* SCANDINAVIAN BELTING COMPANY. June 9, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. T. Hart Anderson* and *Mr. Perry B. Turpin* for petitioner. *Mr. Nicholas M. Goodlett* for respondent.

No. 1023. J. W. SIMPSON *v.* GRAND INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL. June 9, 1919. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of West Virginia denied. *Mr. William H. Werth* for petitioner. *Mr. Matthew M. Neely* for respondents.

No. 1024. G. A. SMITH *v.* GRAND INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL. June 9, 1919. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of West Virginia denied. *Mr. William H. Werth* for petitioner. *Mr. Matthew M. Neely* for respondents.

No. 1025. COLORADO TITLE & TRUST COMPANY *v.* J. G. CHILDERS, JR. June 9, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. H. Barwise, Jr.*, and *Mr. George Thompson* for petitioner. *Mr. A. L. Curtis* for respondent.

No. 1027. WILLIAM E. MIKELL *v.* F. H. HINES, MAJOR, FIELD ARTILLERY, U. S. ARMY. June 9, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Alvah M. Lumpkin* for petitioner. *Mr. Assistant Attorney General Porter* and *Mr. W. C. Herron* for respondent.

No. 1028. FRED BROWNE *v.* CHARLES B. THORN ET AL., PARTNERS DOING BUSINESS AS THORN & MAGINNIS. June 9, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. James B. McDonough* for petitioner. No appearance for respondents.

No. 1030. CARLOS GSELL *v.* INSULAR COLLECTOR OF CUSTOMS. June 9, 1919. Petition for a writ of certiorari

to the Supreme Court of the Philippine Islands denied. *Mr. H. W. Van Dyke* for petitioner. *The Solicitor General* for respondent.

No. 1033. LOUISIANA AGRICULTURAL CORPORATION *v.* PELICAN OIL REFINING COMPANY, INC. June 9, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. T. M. Miller* for petitioner. No appearance for respondent.

No. 1035. MICHIGAN MUTUAL LIFE INSURANCE COMPANY *v.* ANN HOPE OLIVER, AS ADMINISTRATRIX, ETC. June 9, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Forney Johnston* for petitioner. *Mr. Thomas M. Stevens* for respondent.

No. 1037. JOHN H. MUDD ET AL. *v.* ALABAMA MINERAL LAND COMPANY. June 9, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. F. N. Judson* for petitioners. *Mr. John P. Tillman* for respondent.

No. 1038. T. W. M. BOONE *v.* UNITED STATES. June 9, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Joseph M. Hill* and *Mr. Henry L. Fitzhugh* for petitioner. *Mr. Assistant Attorney General Porter* and *Mr. W. C. Herron* for the United States.

No. 1050. DEER ISLAND LUMBER COMPANY ET AL. *v.* SAVANNAH TIMBER COMPANY. June 9, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. William N. Graydon* for petitioners. *Mr. J. J. Darlington* for respondent.

No. 1053. CHARLES C. FOSTER, ACTING SUPERINTENDENT, ETC., *v.* FRANK JOSEPH GOLDSOLL. June 9, 1919. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *The Solicitor General* and *Mr. Benjamin S. Minor* for petitioner. *Mr. J. J. Darlington, Mr. Wilton J. Lambert* and *Mr. Joseph W. Bailey* for respondent.

No. 1054. MECCANO, LIMITED, *v.* JOHN WANAMAKER, NEW YORK. June 9, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Reeve Lewis, Mr. C. A. L. Massie, Mr. W. B. Kerkam* and *Mr. Ralph L. Scott* for petitioner. *Mr. Nicholas M. Goodlett* for respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM MAY 19, 1919, TO JUNE 9, 1919.

No. 961. ELABORATED ROOFING CO. OF BUFFALO, INC., ET AL. *v.* CHARLES S. BIRD. On petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit. May 19, 1919. Petition dismissed, on motion of counsel for petitioners. *Mr. Rudolph Wm. Lotz* for

petitioners. *Mr. William K. Richardson* and *Mr. Harrison F. Lyman* for respondent.

No. 1067. JOHN BERNOT *v.* PETER MORRISON ET AL. Error to the Supreme Court of the State of Washington. June 2, 1919. Docketed and dismissed with costs, on motion of *Mr. Harry R. Gower* for defendants in error. *Mr. Harry R. Gower, Mr. H. W. Canfield* and *Mr. Reese H. Voorhees* for defendants in error. No one opposing.

No. 439. WILLIAM P. RICHARDSON *v.* LIBERTY OIL COMPANY ET AL. Error to the Supreme Court of the State of Louisiana. June 2, 1919. Dismissed, per stipulation. *Mr. E. J. Jacquet* for plaintiff in error. *Mr. Harry Gamble* for defendants in error.

No. 578. WESTERN CASUALTY & GUARANTY INSURANCE COMPANY *v.* CAPITOL STATE BANK OF OKLAHOMA CITY. Error to the Supreme Court of the State of Oklahoma. June 2, 1919. Dismissed, per stipulation. *Mr. H. L. Stuart* for plaintiff in error. *Mr. W. F. Wilson* for defendant in error.

No. 740. H. C. FERRIS ET AL., RECEIVERS, ETC., *v.* B. F. SHANDY. Error to the Supreme Court of the State of Oklahoma. June 2, 1919. Dismissed with costs, on motion of counsel for plaintiffs in error. *Mr. Arthur Miller, Mr. Edward R. Jones* and *Mr. Ephraim H. Foster* for plaintiffs in error. *Mr. Tom D. McKeown* for defendant in error.

No. 761. OHIO VALLEY ELECTRIC RAILWAY COMPANY *v.* J. B. HALL, AS ADMINISTRATOR, ETC. Error to the Court of Appeals of the State of Kentucky. June 2, 1919. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. John F. Haga, Mr. J. W. M. Stewart* and *Mr. George B. Martin* for plaintiff in error. No appearance for defendant in error.

DECISIONS PER CURIAM, FROM OCTOBER 6, 1919, TO NOVEMBER 17, 1919, NOT INCLUDING ACTION ON PETITIONS FOR WRITS OF CERTIORARI.

No. 462. ERIE RAILROAD COMPANY *v.* JAMES JOHN HISSEY FOR THE USE OF JOHN A. CHAPMAN ET AL. Error to the Circuit Court of Appeals for the Seventh Circuit. Motion to dismiss and petition for certiorari submitted October 6, 1919. Motion for leave to amend petition for removal submitted October 13, 1919. Decided October 20, 1919. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726. Petition for certiorari and motion for leave to amend petition for removal denied. *Mr. Mitchell D. Follansbee* for plaintiff in error. *Mr. Murry Nelson* and *Mr. Cyrus Bentley* for defendant in error.

No. 13. WILLIAM J. HOGARTY *v.* PHILADELPHIA & READING RAILWAY COMPANY. Error to the Supreme Court of the State of Pennsylvania. Submitted October 8, 1919. Decided October 20, 1919. *Per Curiam.* The writ of error in this case is dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by § 2 of the Act of September 6, 1916, c. 448, 39 Stat. 726.

The application, consented to by the parties, to convert *nunc pro tunc* the writ of error into a writ of certiorari, or to treat the writ of error as having the effect of a writ of certiorari, is also denied. See Act of September 6, 1916, c. 448, § 7, 39 Stat. 728; *Richard H. Dana, individually,* v. *Richard H. Dana, Executor, etc.,* decided October 13, 1919.

Mr. Alexander Simpson, Jr., and *Mr. Ira Jewell Williams* for plaintiff in error. *Mr. William Clarke Mason* and *Mr. Charles Heebner* for defendant in error.

NOTE: In the cited case of *Dana* v. *Dana* the court on the day mentioned denied a motion to stay the mandate and to amend the proceedings on error into proceedings as on writ of certiorari. See also *S. C.*, *ante*, 220.

No. 175. ARMOUR & COMPANY ET AL. *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY ET AL. Error to the Superior Court of the State of Rhode Island. Motion to dismiss or affirm submitted October 6, 1919. Decided October 20, 1919. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of: (1) *Shulthis* v. *McDougal*, 225 U. S. 561, 569; *Norton* v. *Whiteside*, 239 U. S. 144, 147; *Hull* v. *Burr*, 234 U. S. 712, 720. (2) *Thomas* v. *Iowa*, 209 U. S. 258, 263; *Bowe* v. *Scott*, 233 U. S. 658, 664, 665; and see *El Paso Sash & Door Co.* v. *Carraway*, 245 U. S. 643. (3) *Spies* v. *Illinois*, 123 U. S. 131, 166; *Chapin* v. *Fye*, 179 U. S. 127, 130. *Mr. Eugene A. Kingman* for plaintiffs in error. *Mr. George H. Huddy, Jr.*, and *Mr. Edward G. Buckland* for defendants in error.

No. 90. CITY OF CHICAGO ET AL. *v.* THOMAS E. DEMPCY, AS CHAIRMAN, ETC., ET AL. Error to the Supreme Court of the State of Illinois. Motion to dismiss submitted October 7, 1919. Decided November 10, 1919. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Pawhuska* v. *Pawhuska Oil Co.*, *ante*, 394. *Mr. Samuel A. Ettelson* and *Mr. Chester E. Cleveland* for City of Chicago, plaintiff in error. *Mr. Edward J. Brundage*, *Mr. James H. Wilkerson*, *Mr. George T. Buckingham* and *Mr. Raymond S. Pruitt* for defendants in error.

No. 52. CHARLES S. ASHLEY *v.* WILLIAM CUSHING WAIT ET AL. Error to the Supreme Judicial Court of the State of Massachusetts. Argued October 24, 1919. Decided November 10, 1919. *Per Curiam.* Dismissed without costs for want of jurisdiction upon the authority of *California* v. *San Pablo & Tulare R. R. Co.*, 149 U. S. 308, 314; *Richardson* v. *McChesney*, 218 U. S. 487, 492; *Stearns* v. *Wood*, 236 U. S. 75, 78; *United States* v. *Hamburg-American Co.*, 239 U. S. 466, 475. *Mr. Charles R. Cummings*, with whom *Mr. John W. Cummings* was on the brief, for plaintiff in error. *Mr. William Harold Hitchcock*, with whom *Mr. Henry C. Attwill* was on the brief, for defendants in error.

No. 328. KANSAS CITY *v.* PUBLIC SERVICE COMMISSION OF MISSOURI ET AL. Error to the Supreme Court of the State of Missouri. Motion to dismiss or affirm or advance submitted October 20, 1919. Decided November 10, 1919. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Pawhuska* v. *Pawhuska Oil Co.*, *ante*, 394; and see *City of Chicago* v. *Dempcy*, *ante*, 651. *Mr. Matthew A. Fyke* for plaintiff in error. *Mr. James D. Lindsay*, *Mr. Frank Hagerman* and *Mr. Richard J. Higgins* for defendants in error.

No. 460. RAINIER BREWING COMPANY *v.* GREAT NORTHERN PACIFIC STEAMSHIP COMPANY. Error to the Circuit Court of Appeals for the Ninth Circuit. Motion to dismiss submitted October 20, 1919. Decided November 10, 1919. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *United States* v. *Krall*, 174 U. S. 385; *German National Bank* v. *Speckert*, 181 U. S. 405; *United States* v. *Beatty*, 232 U. S. 463; and see *Eichel* v. *United States Fidelity & Guaranty Co.*, 239 U. S. 629.

Mr. S. J. Wettrick for plaintiff in error. *Mr. Charles H. Carey, Mr. James B. Kerr* and *Mr. Charles A. Hart* for defendant in error.

No. 44. HIRAM C. HIMES ET AL., TRUSTEES, ETC., ET AL. *v.* COMMONWEALTH OF PENNSYLVANIA. Error to the Supreme Court of the State of Pennsylvania. Argued October 23, 1919. Decided November 10, 1919. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726. *Mr. Edmund Bayly Seymour, Jr.*, for plaintiffs in error. *Mr. William M. Hargest*, with whom *Mr. William I. Schaffer* was on the brief, for defendant in error.

No. 46. KENTUCKY HEATING COMPANY ET AL. *v.* CITY OF LOUISVILLE. Error to the Court of Appeals of the State of Kentucky. Argued October 23, 1919. Decided November 10, 1919. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 6 of the Act of September 6, 1916, c. 448, 39 Stat. 727. *Mr. Matthew O'Doherty* for plaintiffs in error. *Mr. Maurice H. Thatcher, Mr. William T. Baskett, Mr. Pendleton Beckley* and *Mr. George Cary Tabb* for defendant in error.

No. 54. CHRISTOPHER L. WILLIAMS, AS RECEIVER, ETC., ET AL. *v.* WILLIAM D. SALTER. Appeal from the Circuit Court of Appeals for the Third Circuit. Submitted October 24, 1919. Decided November 10, 1919. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by

the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726. *Mr. Stuart G. Gibboney* for appellants. *Mr. Lindley M. Garrison* for appellee.

No. 229. LOUISIANA NAVIGATION COMPANY, LIMITED, *v.* OYSTER COMMISSION OF LOUISIANA (NOW DEPARTMENT OF CONSERVATION OF LOUISIANA) ET AL. Error to the Supreme Court of the State of Louisiana. Argued October 22, 1919. Decided November 10, 1919. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726. *Mr. Edward N. Pugh,* with whom *Mr. J. C. Gilmore* and *Mr. Thomas Gilmore* were on the brief, for plaintiff in error. *Mr. L. E. Hall* and *Mr. A. V. Coco,* for defendants in error, submitted.

No. 5. CITY OF BIRMINGHAM *v.* D. J. O'CONNELL. Error to the Supreme Court of the State of Alabama. Submitted October 7, 1919. Decided November 10, 1919. *Per Curiam.* Dismissed without costs for want of jurisdiction upon the authority of *Johnson* v. *Tennessee,* 214 U. S. 485; *California* v. *San Pablo & Tulare R. R. Co.,* 149 U. S. 308, 314; *Richardson* v. *McChesney,* 218 U. S. 487, 492; *Stearns* v. *Wood,* 236 U. S. 75, 78; *United States* v. *Hamburg-American Co.,* 239 U. S. 466, 475. *Mr. Joseph P. Mudd* and *Mr. Samuel D. Weakly* for plaintiff in error. *Mr. Augustus Benners* for defendant in error.

DECISIONS ON PETITIONS FOR WRITS OF CERTIORARI, FROM OCTOBER 6, 1919, TO NOVEMBER 17, 1919.

(A.) PETITIONS GRANTED.[1]

No. 419. E. HILTON JACKSON, RECEIVER, ETC., *v.* JOHN LEWIS SMITH ET AL. October 13, 1919. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted. *Mr. W. W. Millan* for petitioner. *Mr. Louis A. Dent* for respondents.

No. 421. AMERICAN STEEL FOUNDRIES *v.* JAMES T. NEWTON, COMMISSIONER OF PATENTS. October 13, 1919. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted. *Mr. George L. Wilkinson* for petitioner. No brief filed for respondent.

No. 489. SILVER KING COALITION MINES COMPANY *v.* CONKLING MINING COMPANY. October 20, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. W. H. Dickson, Mr. A. C. Ellis, Jr., Mr. Curtis H. Lindley, Mr. R. G. Lucas* and *Mr. Thomas Marioneaux* for petitioner. *Mr. Edward B. Critchlow, Mr. William D. McHugh, Mr. William W. Ray, Mr. William H. King* and *Mr. William J. Barrette* for respondent. *The Solicitor General* as *amicus curiæ. Mr. William C. Prentiss* as *amicus curiæ.*

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[1] For petitions denied, see *post*, 658.

No. 499. PENN MUTUAL LIFE INSURANCE COMPANY *v.* EPHRAIM LEDERER, COLLECTOR OF INTERNAL REVENUE. October 20, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. George Wharton Pepper* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for respondent.

No. 506. EDWARD WHITE, COMMISSIONER OF IMMIGRATION FOR THE PORT OF SAN FRANCISCO, *v.* CHIN FONG. October 20, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *The Solicitor General* and *Mr. Assistant Attorney General Stewart* for petitioner. No appearance for respondent.

No. 511. GUISEPPE CAVALLARO *v.* STEAMSHIP CARLO POMA, HER ENGINES, ETC., KINGDOM OF ITALY, CLAIMANT. October 20, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. D. Roger Englar* and *Mr. Oscar R. Houston* for petitioner. *Mr. Charles C. Burlingham* and *Mr. Van Vechten Veeder* for respondent.

No. 525. WORTH BROTHERS COMPANY *v.* EPHRAIM LEDERER, COLLECTOR OF INTERNAL REVENUE. October 20, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. A. H. Wintersteen* for petitioner. *Mr. Assistant Attorney General Frierson* for respondent. *Mr. J. Sprigg McMahon* as *amicus curiæ*. *Mr. E. G. Curtis* as *amicus curiæ*.

No. 526. FORGED STEEL WHEEL COMPANY *v.* C. G. LEWELLYN, COLLECTOR OF INTERNAL REVENUE. October 20, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. George Sutherland, Mr. George B. Gordon* and *Mr. William Watson Smith* for petitioner. *Mr. Assistant Attorney General Frierson* for respondent. *Mr. J. Sprigg McMahon* as *amicus curiæ*. *Mr. E. G. Curtis* as *amicus curiæ*.

No. 535. CARBON STEEL COMPANY *v.* C. G. LEWELLYN, COLLECTOR OF INTERNAL REVENUE. October 20, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Frederick deC. Faust* for petitioner. *Mr. Assistant Attorney General Frierson* for respondent.

No. 536. STARK BROS. NURSERIES & ORCHARDS COMPANY *v.* WILLIAM P. STARK ET AL., TRUSTEES, ETC. October 20, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Andrew B. Remick* for petitioner. *Mr. Xenophon P. Wilfley* for respondents.

No. 492. FEDERAL TRADE COMMISSION *v.* ANDERSON GRATZ ET AL., ETC. October 20, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *The Solicitor General, Mr. Claude R. Porter* and *Mr. Huston Thompson* for petitioner. *Mr. Thomas F. Magner* for respondents.

No. 395. A. L. BRACHT *v.* SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY. October 27, 1919. Petition for a writ of certiorari to the Kansas City Court of Appeals of the State of Missouri granted. *Mr. I. N. Watson* for petitioner. No appearance for respondent.

No. 415. PHILADELPHIA & READING RAILWAY COMPANY *v.* MARGARET L. HANCOCK. Error to the Supreme Court of the State of Pennsylvania. November 10, 1919. Petition for a writ of certiorari herein granted. *Mr. Charles Heebner* and *Mr. George Gowen Perry*, for plaintiff in error, in support of the petition. *Mr. Hannis Taylor*, for defendant in error, in opposition to the petition.

No. 552. STANDARD FASHION COMPANY *v.* MAGRANE-HOUSTON COMPANY. November 10, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. Robert G. Dodge, Mr. Charles E. Hughes, Mr. Herbert Noble* and *Mr. James B. Sheehan* for petitioner. No appearance for respondent.

(B). PETITIONS DENIED.

No. 371. DANIEL CURRY CAMPBELL *v.* MARYLAND CASUALTY COMPANY. October 13, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. A. H. King* and *Mr. Roswell King* for petitioner. *Mr. Walter L. Clark* and *Mr. William C. Prentiss* for respondent.

No. 381. HOUSTON OIL COMPANY OF TEXAS *v.* MRS. M. J. BROWN. October 13, 1919. Petition for a writ of certiorari to the Court of Civil Appeals, Ninth Supreme Judicial District, of the State of Texas denied. *Mr. Thomas M. Kennerly* and *Mr. H. O. Head* for petitioner. No appearance for respondent.

No. 383. JAMES B. ROBERTS, ADMINISTRATOR, ETC., *v.* TENNESSEE COAL, IRON & RAILROAD COMPANY. October 13, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Hannis Taylor* and *Mr. William Augustus Denson* for petitioner. No appearance for respondent.

No. 384. D. M. HARDY ET AL. *v.* UNITED STATES. October 13, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William H. Atwell* and *Mr. J. H. Barwise, Jr.*, for petitioners. *Mr. Assistant Attorney General Brown* for the United States.

No. 389. ISIDORE S. WORKIN ET AL. *v.* UNITED STATES. Error to the Circuit Court of Appeals for the Second Circuit. October 13, 1919. Petition for a writ of certiorari herein denied. *Mr. Lawrence B. Cohen*, for plaintiffs in error, in support of the petition. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely*, for the United States, in opposition to the petition.

No. 396. ERIE RAILROAD COMPANY *v.* TIMOTHY KIRBY. October 13, 1919. Petition for a writ of certiorari to the

Supreme Court, Appellate Division, Third Department, State of New York, denied. *Mr. Adelbert Moot* for petitioner. *Mr. Thomas C. Burke* for respondent.

No. 403. NORDYKE AND MARMON COMPANY *v.* CITY OF INDIANAPOLIS. October 13, 1919. Petition for a writ of certiorari to the Superior Court of Marion County, State of Indiana, denied. *Mr. Clarence E. Weir* and *Mr. Charles W. Richards* for petitioner. *Mr. Samuel Ashby* for respondent.

No. 404. H. LAUTER COMPANY *v.* CITY OF INDIANAPOLIS. October 13, 1919. Petition for a writ of certiorari to the Superior Court of Marion County, State of Indiana, denied. *Mr. Clarence E. Weir* and *Mr. Charles W. Richards* for petitioner. *Mr. Samuel Ashby* for respondent.

No. 414. WILLIAM DODGE *v.* UNITED STATES. October 13, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Irving M. Weiss* and *Mr. Eustace Reynolds* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for the United States.

No. 417. VIRGINIAN RAILWAY COMPANY *v.* VERNON HALSTEAD, WHO SUES BY NORA HALSTEAD, HIS NEXT FRIEND. October 13, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Walter H. Taylor* for petitioner. No appearance for respondent.

No. 420. JAMES A. KEOWN *v.* A. FRANCIS HAYDEN, ADMINISTRATOR, ETC. October 13, 1919. Petition for a writ of certiorari to the Supreme Judicial Court of the State of Massachusetts denied. *Mr. James A. Keown* pro se. No appearance for respondent.

No. 423. CHICAGO & NORTHWESTERN RAILWAY COMPANY *v.* HERMAN VAN DE ZANDE. Error to the Supreme Court of the State of Wisconsin. October 13, 1919. Petition for a writ of certiorari herein denied. *Mr. R. N. Van Doren*, for plaintiff in error, in support of the petition. *Mr. Robert A. Kaftan* and *Mr. John W. Reynolds*, for defendant in error, in opposition to the petition.

No. 429. JOSEPH M. COLDWELL *v.* UNITED STATES. October 13, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Walter Nelles* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for the United States.

No. 430. WILHELM SCHUMANN *v.* UNITED STATES. October 13, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. C. H. Van Law* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for the United States.

No. 431. CHESAPEAKE & POTOMAC TELEPHONE COMPANY *v.* J. ROBERT SOMMERVILLE. October 13, 1919.

Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Henry B. F. Macfarland* for petitioner. *Mr. George E. Sullivan* for respondent.

No. 432. CLARENCE W. TURNER *v.* FRED E. TURNER. October 13, 1919. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. A. A. Davidson* and *Mr. Preston C. West* for petitioner. *Mr. Richard W. Stoutz, Mr. J. W. Zevely* and *Mr. J. M. Givens* for respondent.

No. 433. CATHERINE NEIDLEIN, AS ADMINISTRATRIX, ETC., *v.* SOUTHERN PACIFIC COMPANY. October 13, 1919. Petition for a writ of certiorari to the Supreme Court of the State of California denied. *Mr. Theodore A. Bell* and *Mr. Stanley D. Willis* for petitioner. *Mr. Robert T. Devlin* and *Mr. William H. Devlin* for respondent.

No. 436. INTERSTATE BUSINESS MEN'S ACCIDENT ASSOCIATION *v.* EDITH A. LESTER. October 13, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Fred P. Carr* and *Mr. R. M. Haines* for petitioner. *Mr. Leonard S. Ferry* for respondent.

No. 439. NATIONAL CAN COMPANY *v.* OLIN S. FELLOWS. October 13, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Clement R. Stickney* for petitioner. *Mr. William R. Moss* for respondent.

No. 440. MRS. DONIE MORRISON, ADMINISTRATRIX, ETC., *v.* LOUISVILLE & NASHVILLE RAILROAD COMPANY. October 13, 1919. Petition for a writ of certiorari to the Supreme Court of the State of Tennessee denied. *Mr. John J. Vertrees* for petitioner. *Mr. John B. Keeble* for respondent.

No. 442. STANDARD SILK DYEING COMPANY *v.* ROESSLER & HASSLACHER CHEMICAL COMPANY. October 13, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Hugh Gordon Miller* and *Mr. Homer S. Cummings* for petitioner. *Mr. Garrard Glenn* for respondent.

No. 443. AMERICAN CAR & FOUNDRY COMPANY *v.* SAROPIA ROCHA. October 13, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. M. F. Watts, Mr. William R. Gentry, Mr. John O. H. Pitney* and *Mr. John R. Hardin* for petitioner. *Mr. Thomas Bond* and *Mr. Edward W. Foristel* for respondent.

No. 447. G. A. VEDIN *v.* UNITED STATES. October 13, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. William H. Chapman* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for the United States.

No. 448. EDWARD D. STEGER ET AL., COMPOSING THE FIRM OF STEGER & COMPANY, *v.* MOUNTFORD S. ORTH.

October 13, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Addison S. Pratt*, *Mr. Joseph W. Bailey* and *Mr. William J. Hughes* for petitioners. *Mr. Origen S. Seymour* and *Mr. Alfred S. Barnard* for respondent.

No. 450. JAMES A. KEOWN *v.* JULIA E. TRUDO ET AL. October 13, 1919. Petition for a writ of certiorari to the Superior Court of the State of Massachusetts denied. *Mr. James A. Keown* pro se. No appearance for respondents.

No. 453. PARKER STENNICK, TRUSTEE, ETC., *v.* WILLARD N. JONES ET AL. October 13, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Thomas Mannix* for petitioner. No appearance for respondents.

No. 454. SARAH CHANDLER SHAPLEY *v.* GEORGE M. KLINE ET AL. October 13, 1919. Petition for a writ of certiorari to the Supreme Judicial Court of the State of Massachusetts denied. *Sarah Chandler Shapley* pro se. *Mr. Arthur Thad Smith* and *Mr. William Harold Hitchcock* for respondents.

No. 459. CONCRETE STEEL COMPANY *v.* GEORGE E. VANDENBURGH. October 13, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Thomas J. Johnston* for petitioner. *Mr. Carlos P. Griffin* for respondent.

No. 463. PHILIP CHASS *v.* UNITED STATES. October 13, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Benjamin M. Weinberg* for petitioner. *The Solicitor General* for the United States.

No. 462. ERIE RAILROAD COMPANY *v.* JAMES JOHN HISSEY FOR THE USE OF JOHN A. CHAPMAN ET AL. See *ante*, 650.

No. 13. WILLIAM J. HOGARTY *v.* PHILADELPHIA & READING RAILWAY COMPANY. See *ante*, 650.

No. 452. KATHERINE KEVER, WIDOW OF GEORGE KEVER, *v.* PHILADELPHIA & READING COAL & IRON COMPANY. October 20, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Albert P. Massey* for petitioner. *Mr. Pierre M. Brown* for respondent.

No. 475. NATIONAL SURETY COMPANY ET AL. *v.* COMMONWEALTH OF VIRGINIA AT RELATION AND FOR BENEFIT OF WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY. October 20, 1919. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia denied. *Mr. Wilton J. Lambert, Mr. J. J. Darlington, Mr. Frank J. Hogan* and *Mr. Rudolph H. Yeatman* for petitioners. *Mr. Eppa Hunton, Jr.*, for respondent.

No. 477. WYSONG & MILES COMPANY ET AL. *v.* PLANTERS NATIONAL BANK OF RICHMOND, VIRGINIA. Error to

the Supreme Court of the State of North Carolina. October 20, 1919. Petition for a writ of certiorari herein denied. *Mr. Thomas J. Jerome*, for plaintiffs in error, in support of the petition. *Mr. Garland S. Ferguson, Jr.*, and *Mr. Ashbel B. Kimball*, for defendant in error, in opposition to the petition.

No. 478. WYSONG & MILES COMPANY ET AL. *v.* BANK OF NORTH AMERICA, PHILADELPHIA, PENNSYLVANIA. Error to the Supreme Court of the State of North Carolina. October 20, 1919. Petition for a writ of certiorari herein denied. *Mr. Thomas J. Jerome*, for plaintiffs in error, in support of the petition. *Mr. Garland S. Ferguson, Jr.*, and *Mr. Ashbel B. Kimball*, for defendant in error, in opposition to the petition.

No. 480. KEITH LUMBER COMPANY *v.* HOUSTON OIL COMPANY OF TEXAS ET AL. October 20, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. H. M. Garwood* for petitioner. No appearance for respondents.

No. 481. FIEGER-AUSTIN DREDGING COMPANY *v.* OTTO MARMET COAL & MINING COMPANY. October 20, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Lowrie C. Barton* for petitioner. *Mr. Charles H. Stephens* for respondent.

No. 485. ERIE RAILROAD COMPANY *v.* JACOB SCHLEENBAKER. October 20, 1919. Petition for a writ of certi-

orari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. J. Paul Lamb* for petitioner. *Mr. C. H. Henkel* for respondent.

No. 488. ANNA RUST ET AL. *v.* FIRST NATIONAL BANK OF SWEETWATER, TEXAS. October 20, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Henry C. Coke* for petitioners. No appearance for respondent.

No. 490. MILTON A. MILLER, as COLLECTOR OF INTERNAL REVENUE, *v.* MATILDA M. GEARIN. October 20, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *The Solicitor General* and *Mr. Assistant Attorney General Frierson* for petitioner. *Mr. John M. Gearin* for respondent.

No. 495. ANTERO & LOST PARK RESERVOIR COMPANY ET AL. *v.* GAS SECURITIES COMPANY ET AL. October 20, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. L. F. Twitchell* and *Mr. Irving B. Melville* for petitioners. *Mr. Platt Rogers* for respondents.

No. 498. NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY *v.* L. J. AUSTIN. October 20, 1919. Petition for a writ of certiorari to the Supreme Court of the State of Tennessee denied. *Mr. Fitzgerald Hall* for petitioner. *Mr. Montague S. Ross* for respondent.

No. 501. TRUMAN A. KETCHUM *v.* PLEASANT VALLEY COAL COMPANY ET AL. Appeal from the Circuit Court of Appeals for the Eighth Circuit. October 20, 1919. Petition for a writ of certiorari herein denied. *Mr. Charles C. Dey* and *Mr. E. A. Walton*, for appellant, in support of the petition. No appearance for appellees.

No. 507. PHILADELPHIA & READING RAILWAY COMPANY *v.* PHILADELPHIA, GERMANTOWN & NORRISTOWN RAILROAD COMPANY. October 20, 1919. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania denied. *Mr. Abraham M. Beitler* for petitioner. *Mr. James Wilson Bayard* for respondent.

No. 509. COLEMAN & COMPANY *v.* TAWAS COMPANY, Inc. October 20, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Jacob J. Lesser* and *Mr. Louis Ottenberg* for petitioner. *Mr. Julius I. Peyser* for respondent.

No. 510. WILLIAM A. JAMISON ET AL., TRADING AS JAY STREET TERMINAL, *v.* CENTRAL RAILROAD COMPANY OF NEW JERSEY ET AL. October 20, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. D. Roger Englar* and *Mr. Dix W. Noel* for petitioners. *Mr. Samuel Park* and *Mr. Henry E. Mattison* for respondents.

No. 512. PRUDENTIAL INSURANCE COMPANY OF AMERICA *v.* GEORGE W. RAGAN, ADMINISTRATOR ETC. October

20, 1919. Petition for a writ of certiorari to the Court of Appeals of the State of Kentucky denied. *Mr. William Marshall Bullitt* for petitioner. *Mr. Robert D. Vance* for respondent.

No. 515. FREDERICK O. BALCOM *v.* UNITED STATES. October 20, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Jesse C. Adkins* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for the United States.

No. 517. CRENSHAW BROS. & SAFFOLD, A COPARTNERSHIP, ETC., *v.* SOUTHERN PACIFIC COMPANY. October 20, 1919. Petition for a writ of certiorari to the District Court of Appeal, Third Appellate District, of the State of California, denied. *Mr. L. T. Hatfield* and *Mr. Edward M. Cleary* for petitioner. *Mr. Henley C. Booth* for respondent.

No. 518. T. L. SMITH COMPANY ET AL. *v.* CEMENT TILE MACHINERY COMPANY. October 20, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Thomas F. Sheridan, Mr. George L. Wilkinson* and *Mr. Walter A. Scott* for petitioners. *Mr. John E. Stryker* for respondent.

No. 527. LEWIS A. STEBBINS *v.* A. F. SELIG. October 20, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. L. A. Stebbins, Mr. W. H. Sears* and *Mr. X. O. Pindall* for peti-

tioner. *Mr. Thomas S. Buzbee* and *Mr. George B. Pugh* for respondent.

No. 528. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* INDUSTRIAL COMMISSION OF ILLINOIS ET AL. October 20, 1919. Petition for a writ of certiorari to the Supreme Court of the State of Illinois denied. *Mr. W. F. Dickinson, Mr. Thomas P. Littlepage* and *Mr. Sidney F. Taliaferro* for petitioner. No appearance for respondents.

No. 529. TOLEDO & OHIO CENTRAL RAILWAY COMPANY *v.* PUBLIC UTILITIES COMMISSION OF OHIO. October 20, 1919. Petition for a writ of certiorari to the Supreme Court of the State of Ohio denied. *Mr. Frederick W. Gaines* for petitioner. *Mr. John G. Price* and *Mr. H. B. Arnold* for respondent.

No. 538. CLAY ARTHUR PIERCE ET AL. *v.* UNITED STATES. Appeal from the Circuit Court of Appeals for the Eighth Circuit. October 20, 1919. Petition for a writ of certiorari herein denied. *Mr. Samuel W. Fordyce, Mr. Thomas W. White* and *Mr. Levi Cooke,* for appellants, in support of the petition. *The Solicitor General* and *Mr. A. F. Myers,* for the United States, in opposition to the petition.

No. 539. NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY *v.* CLINTON F. PUGH. October 20, 1919. Petition for a writ of certiorari to the Court of Appeals, Eighth Judicial District, of the State of Ohio, denied. *Mr.*

William D. Turner for petitioner. *Mr. Newton D. Baker* for respondent.

No. 542. CITY OF NEW YORK *v.* CONSOLIDATED GAS COMPANY OF NEW YORK ET AL. October 20, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William P. Burr* for petitioner. *Mr. John A. Garver* for respondents.

No. 545. PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY *v.* ELLSWORTH G. COLE. October 20, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Andrew Squire* and *Mr. Thomas M. Kirby* for petitioner. *Mr. Albert E. Powell* for respondent.

No. 546. BENJAMIN FRIEDMAN *v.* UNITED STATES. October 20, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Benjamin Friedman* pro se. *The Solicitor General* for the United States.

No. 550. RAYMOND A. KELLY, ADMINISTRATOR, ETC., *v.* HERBERT B. MCKEOWN. October 20, 1919. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota denied. *Mr. John Francis Kelly* for petitioner. *Mr. Trafford N. Jayne* for respondent.

No. 559. COLUMBUS PACKING COMPANY *v.* STATE OF OHIO ON THE RELATION OF HUGO N. SCHLESINGER, PROSE-

CUTING ATTORNEY, ETC., ET AL. October 20, 1919. Petition for a writ of certiorari to the Supreme Court of the State of Ohio denied. *Mr. Smith W. Bennett* and *Mr. Ralph E. Westfall* for petitioner. *Mr. Timothy S. Hogan, Mr. E. J. Hainer* and *Mr. Fred C. Rector* for respondents.

No. 422. M. HAMPTON TODD ET AL., RECEIVERS, ETC., *v.* HEULINGS LIPPINCOTT ET AL., RECEIVERS, ETC. October 20, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. J. H. Brinton* for petitioners. *Mr. Henry P. Brown* for respondents.

No. 483. AMERICAN DISTRIBUTING COMPANY *v.* HAYES WHEEL COMPANY. October 20, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Thomas E. Barkworth* for petitioner. No appearance for respondent.

No. 514. HOWARD W. SHOWALTER *v.* UNITED STATES. October 20, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. John A. Howard* for petitioner. No brief filed for the United States.

No. 519. CHAUNCEY J. HAMLIN ET AL., AS SURVIVING EXECUTORS, ETC., ET AL. *v.* MARY K. WELLINGTON, INDIVIDUALLY AND AS EXECUTRIX, ETC., ET AL. October 20, 1919. Petition for a writ of certiorari to the Surrogate's Court of Erie County, State of New York, denied. *Mr.*

Dana B. Hellings for petitioners. *Mr. G. B. Wellington* for respondents.

No. 533. GEORGE W. BELVIN *v.* UNITED STATES. October 20, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Nathaniel T. Green* for petitioner. *The Solicitor General* for the United States.

No. 556. SEABOARD AIR LINE RAILWAY COMPANY *v.* BALTIMORE TRUST COMPANY ET AL. October 20, 1919. Petition for a writ of certiorari to the Supreme Court of the State of Georgia denied. *Mr. Jack J. Spalding* for petitioner. *Mr. Bryan Cumming* and *Mr. Joseph B. Cumming* for respondents.

No. 565. WHITE OAK FUEL COMPANY *v.* BERTRAM U. CARTER ET AL., COPARTNERS, ETC. October 20, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. John P. Leahy* and *Mr. John V. Lee* for petitioner. No appearance for respondents.

No. 487. CUDAHY PACKING COMPANY *v.* EDWARD B. PRYOR, RECEIVER, ETC. October 27, 1919. Petition for a writ of certiorari to the Kansas City Court of Appeals of the State of Missouri denied. *Mr. George T. Buckingham* and *Mr. Charles T. Tittmann* for petitioner. *Mr. Frederic D. McKenney* for respondent.

No. 451. DAVID LAMAR ET AL. *v.* UNITED STATES. Error to the Circuit Court of Appeals for the Second Cir-

cuit. October 27, 1919. Petition for a writ of certiorari herein denied. *Mr. Elijah N. Zoline*, for plaintiffs in error, in support of the petition. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely*, for the United States, in opposition to the petition.

No. 532. JUNG BACK SING ET AL. *v.* EDWARD WHITE, AS COMMISSIONER OF IMMIGRATION, ETC. November 10, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Jackson H. Ralston* for petitioners. *The Solicitor General* for respondent.

No. 558. G. E. HOSIER *v.* UNITED STATES. November 10, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Henry Bowden* and *Mr. Thomas H. Willcox* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for the United States.

No. 560. PETER WEISSENGOFF *v.* GEORGE R. DAVIS, ADMINISTRATOR, ETC. November 10, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. William L. Marbury* for petitioner. *Mr. Albert A. Doub* and *Mr. Harry G. Fisher* for respondent.

No. 576. WALTER HEYNACHER *v.* UNITED STATES. November 10, 1919. Petition for a writ of certiorari to

the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Louis W. Crofoot* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for the United States.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM OCTOBER 6, 1919, TO NOVEMBER 17, 1919.

No. 201. JOHN W. FROTHINGHAM ET AL., ETC., *v.* UNITED STATES. Appeal from the Court of Claims. October 6, 1919. Dismissed, on motion of *Mr. Simon Lyon* for appellants. *Mr. Simon Lyon, Mr. R. B. H. Lyon* and *Mr. Fred L. Fishback* for appellants. *The Attorney General* for the United States.

No. 107. POSTAL TELEGRAPH-CABLE COMPANY *v.* CITY OF OIL CITY. Error to the Superior Court of the State of Pennsylvania. October 6, 1919. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. Bynum E. Hinton* for plaintiff in error. *Mr. Peter M. Speer* for defendant in error.

No. 246. MARION CALDWELL, AS STATE SUPERVISOR OF OIL INSPECTION, ETC., *v.* MOORE OIL COMPANY ET AL. Appeal from the District Court of the United States for the District of Indiana. October 6, 1919. Dismissed with costs, on motion of counsel for appellant. *Mr. Ele Stansbury* and *Mr. Will R. Wood* for appellant. *Mr. Charles D. Chamberlin* for appellees.

No. 255. FRANK E. LOW *v.* K. SUGAWA & COMPANY, LIMITED. Error to the District Court of the United States for the Southern District of New York. October 6, 1919. Dismissed, per stipulation. *Mr. Abram J. Rose* for plaintiff in error. *Mr. Henry Swartz* for defendant in error.

No. 275. ARKANSAS CENTRAL RAILROAD COMPANY *v.* W. L. GOAD. Error to the Supreme Court of the State of Arkansas. October 6, 1919. Dismissed, per stipulation. *Mr. Thomas B. Pryor* for plaintiff in error. *Mr. Charles I. Evans* for defendant in error.

No. 368. J. K. LUMBER COMPANY *v.* E. P. ASH. Error to the Supreme Court of the State of Washington. October 6, 1919. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. Harrison G. Platt* and *Mr. Robert Treat Platt* for plaintiff in error. *Mr. Fred Miller* for defendant in error.

No. 398. GREAT LAKES DREDGE & DOCK COMPANY *v.* EASTERN STEAMSHIP CORPORATION. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit. October 6, 1919. Dismissed, on motion of counsel for petitioner. *Mr. Charles E. Kremer* for petitioner. *Mr. Edward S. Dodge* for respondent.

No. 428. ALABAMA & VICKSBURG RAILWAY COMPANY ET AL. *v.* W. W. BEARD. Error to the Supreme Court of the State of Mississippi. October 6, 1919. Writ of error

and petition for writ of certiorari dismissed, per stipulation. *Mr. J. Blanc Monroe, Mr. Monte M. Lemann, Mr. Robert H. Thompson* and *Mr. J. Hirsh* for plaintiffs in error. *Mr. Marcellus Green, Mr. Garner Wynn Green, Mr. W. J. Lamb* and *Mr. N. Vick Robbins* for defendant in error.

No. 392. FREDERICK SCHREIBER ET AL., ETC., *v.* GERMAN EVANGELICAL PROTESTANT CONGREGATION OF THE CHURCH OF THE HOLY GHOST ET AL. October 13, 1919. Petition for a writ of certiorari to the Supreme Court of the State of Missouri dismissed, on motion of counsel for petitioner. *Mr. Lon O. Hocker* for petitioners. No appearance for respondents.

No. 361. HERMAN THEDEN ET AL. *v.* UNION PACIFIC RAILROAD COMPANY. Error to the Supreme Court of the State of Kansas. October 16, 1919. Dismissed with costs, on motion of counsel for plaintiffs in error. *Mr. L. W. Keplinger* for plaintiffs in error. *Mr. R. W. Blair* and *Mr. N. H. Loomis* for defendant in error.

No. 41. J. EUGENE JORDAN *v.* BOARD OF MEDICAL EXAMINERS OF THE STATE OF WASHINGTON. Error to the Supreme Court of the State of Washington. October 17, 1919. Dismissed with costs, pursuant to the sixteenth rule, on motion of *Mr. Blackburn Esterline* in behalf of counsel for defendant in error. *Mr. Edward Judd* for plaintiff in error. *Mr. W. V. Tanner* for defendant in error.

No. 57. JULIUS WILBUR *v.* STATE OF OREGON. Error to the Supreme Court of the State of Oregon. October 23, 1919. Dismissed with costs, pursuant to the sixteenth rule, on motion of *Mr. Frederick S. Tyler* in behalf of *Mr. George M. Brown* for defendant in error. *Mr. Guy C. H. Corliss* and *Mr. Edward J. Brazell* for plaintiff in error. *Mr. George M. Brown* and *Mr. Gilbert L. Hodges* for defendant in error.

No. 247. UNITED STATES ON THE RELATION OF SIMON WEINER *v.* NATHAN GORDON ET AL., ETC., ET AL. Error to and appeal from the District Court of the United States for the Southern District of New York. October 27, 1919. Dismissed with costs, on motion of *The Solicitor General* in behalf of counsel for plaintiff in error and appellant. *Mr. Alexander S. Drescher* and *Mr. Alex. S. Rosenthal* for plaintiff in error and appellant. *The Solicitor General* for defendants in error and appellees.

No. 299. H. E. KIRCHNER *v.* UNITED STATES. On writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit. October 27, 1919. Dismissed, on motion of *The Solicitor General* in behalf of counsel for petitioner. *Mr. J. W. Vandervort* for petitioner. *Mr. John Lord O'Brian*, Special Assistant to the Attorney General, and *Mr. Alfred Bettman*, Special Assistant to the Attorney General, for the United States.

No. 45. THOMAS S. HAYMOND *v.* ANTHONY BOWEN ET AL. Appeal from the District Court of the United States for the Northern District of West Virginia. October 27,

1919. Dismissed with costs, on motion of counsel for appellant. *Mr. John A. Howard* for appellant. *Mr. Allison S. Fleming* for appellees.

No. 217. BARBER ASPHALT PAVING COMPANY *v.* WILLIAM H. WOERHEIDE ET AL. Certiorari to the Circuit Court of Appeals for the Eighth Circuit. November 10, 1919. Dismissed with costs, on motion of counsel for petitioner. *Mr. Joseph C. Fraley* and *Mr. Henry N. Paul* for petitioner. *Mr. George F. Haid* and *Mr. Philip W. Haberman* for respondents.

CASES DISPOSED OF IN VACATION.

No. 315. COUNTY OF CHAMPAIGN *v.* PEOPLE OF THE STATE OF ILLINOIS *ex rel.* CITY OF CHAMPAIGN ET AL. Error to the Supreme Court of the State of Illinois. August 21, 1919. Dismissed with costs, pursuant to the twenty-eighth rule. *Mr. Donald C. Dobbins* for plaintiff in error. *Mr. Fred B. Hamill* for defendants in error.

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6. *Id. Telegraph Companies.* Company which has accepted Act of 1866 and is engaged in interstate business *held* subject to city tax on poles and wires erected in streets under franchise ordinance. *Mackay Tel. Co.* v. *Little Rock* 94

7. *Regulating Railroad Tracks.* Ordinance which makes no discrimination against interstate commerce, and affects it only incidentally and indirectly, not objectionable. *Denver & Rio Grande R. R.* v. *Denver* 241

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8. *Railroads; Condemnation.* Parts of interstate right of way and bridges over navigable waters may be condemned for use of telegraph company under state law. *Louis. & Nash. R. R.* v. *Western Union Tel. Co.* 363

9. *Id. Post-Roads Act 1866.* Waived objection to such exercise of state sovereignty as interference with interstate commerce. *Id.*

10. *Mail Cars.* State law regulating equipment, etc., of end cars, as applied to interstate train, *held* to invade field occupied by Congress through regulations of Postmaster General, Safety Appliance Act and regulations of Interstate Commerce Commission. *Pennsylvania R. R.* v. *Public Service Comm.* 566

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3. *Railroad Tracks; Public Safety.* Requiring removal of a track, constructed under an ordinance grant, where it crossed thoroughfare. *Denver & Rio Grande R. R.* v. *Denver* 241

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VI. **Privileges and Immunities.** See XI, 17, (5), *infra.*

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2. *Id. Inheritance Tax.* Does not prevent state tax on privilege of inheritance from nonresident decedent of property within State. *Id.*

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3. *Id. Resident and Citizen. Quære:* Whether clause applies when discrimination in state inheritance tax law is based not on citizenship but on residence or nonresidence of decedent? *Id.*

4. *Cash Bail; Clerk's Fees.* Retention by clerk of percentage of deposit does not violate this clause. *Berkman* v. *United States*. 114

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2. *Id. State Police Power.* No room for a presumption, in construing act, that powers of States, respecting such rates, was to continue. *Id.*

3. *Telephones and Telegraphs.* Joint Resolution of 1918, authorizing President to take possession and control of and to operate, within war power. *Dakota Cent. Tel. Co.* v. *South Dakota* 163
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4. *Id. Exercise of Power; Motive.* Whether exercise justified by conditions or actuated by proper motives, not within cognizance of judiciary. *Id.*

5. *Cable Lines.* Suit to enjoin interference as in excess of power given by Joint Resolution of July 16, 1918; becomes moot upon restoration of lines to owners. *Commercial Cable Co.* v. *Burleson*. 360

VIII. **Fifth Amendment.** See **Eminent Domain,** 1.

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2. *Id. Witnesses.* May not refuse to answer upon ground that court and jury are without jurisdiction over offense under investigation. *Id.*

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3. *Self-Incrimination.* Matter of defense at trial, which cannot be anticipated in removal proceedings. *Rumely* v. *McCarthy* 283

4. *Due Process; Liberty of Contract.* Power of Congress, in appropriating for payment of Civil War claim, to restrict amount of it payable to attorneys as a fee for services in securing the appropriation, under a preëxisting valid contract. *Capital Trust Co.* v. *Calhoun* 208

5. *Cash Bail and Clerk's Fees.* Retention by clerk as compensation of percentage of deposit of cash bail in criminal case does not violate Amendment. *Berkman* v. *United States* 114

IX. **Sixth Amendment.**

1. *Peremptory Challenges.* Constitution does not require Congress to grant in criminal cases; and Jud. Code, § 287, providing that all of several defendants shall be treated as one for purposes of such challenges does not infringe right to impartial jury. *Stilson* v. *United States.* 583

2. *Removal Proceedings.* Where defendant indicted in two districts, it is discretionary with court of one to order removal to the other district under later indictment. *Rumely* v. *McCarthy.* 283

X. **Eighth Amendment.**

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(2) *Notice and Hearing.* See 28, *infra.*

2. *Improvement Districts; Assessment.* Notice to owners of formation and bounds not necessary when established by legislative authority; *contra*, when established by administrative or *quasi*-judicial authority. *Hancock* v. *Muskogee* .. 454

3. *Id. Apportionment.* No necessity for hearing when mode prescribed by legislature. *Id.*

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(3) *Liberty and Property; Police Power; Eminent Domain.* See 36, *infra.*

4. *State Inheritance Tax*, on succession to local property of nonresident decedent, measured by ratio in value to entire estate, including property in other States, is not a tax on property beyond jurisdiction. *Maxwell* v. *Bugbee* 525

5. *Arizona Employers' Liability Law; Hazardous Occupations.* Liability in compensatory damages, without regard to fault, for injury due to conditions of occupation but not caused by employee's negligence. *Arizona Employers' Liability Cases* 400

6. *Id. Public Welfare.* As a regulation to prevent employees from becoming burden on public, law is not arbitrary or unreasonable. *Id.*

7. *Id. Jury.* Issues of fact and compensatory damages may be left to jury. *Id.*

8. *Id. Measure of Compensation.* Methods of determining and manner of distribution are questions for State. *Id.*

9. *Id. Workmen's Compensation Law; Election.* Allowing election between restricted recovery under compensation law where employee guilty of contributory negligence, and full compensatory damages under Liability Act where he is not, is consistent with due process and equal protection. *Id.*

10. *Id. Risk of Enterprise.* Voluntary conduct may be put at peril of those pursuing it. *Id.*

11. *Id. Safety of Employees.* Holding employer liable for accidents to secure safety is a constitutional object of legislation. *Id.*

12. *Id. Pain and Mutilation; Burden of Cost.* In allowing damages, law throws cost on employer, and, indirectly, on public. *Id.*

13. *Id. Excessive Verdicts.* Liability limited to conscientious valuation of loss; presumed juries and courts will confine it accordingly. *Id.*

14. *Workmen's Compensation Law; Disfigurement.* New York law providing awards for disfigurement, not arbitrary. *New York Cent. R. R.* v. *Bianc* 596

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15. *Id. Earning Power.* Compensation of workmen injured in hazardous industries need not be based exclusively on loss of earning power. *Id.*

16. *Id. Payment of Compensation.* Whether in combination with or independently of award for inability to work, and whether in single sum or installments, for State to determine. *Id.*

17. *Foreign Insurance Co.; Agents.* State law may make persons applying for insurance or receiving or transmitting premiums agents of foreign company, despite contrary stipulations in policy. *American Fire Ins. Co.* v. *King Lumber Co.* 2

18. *License Tax.* Tax on right to manufacture within city, computed on amount of sales of goods so manufactured, is a tax upon business of manufacture within city, and not upon sales. *American Mfg. Co.* v. *St. Louis* 459

19. *Id. Foreign Corporations.* Such tax when computed on sales of goods manufactured in city, but removed, and afterwards sold, beyond State, does not deprive of property without due process. *Id.*

20. *Id. Testing Constitutionality,* by practical operation and effect. *Id.*

21. *Telegraph Companies; License Tax,* on poles and wires in streets under franchise ordinance, including those on railroad right of way brought within city limits after franchise ordinance accepted. *Mackay Tel. Co.* v. *Little Rock* 94

22. *Id. Pole Tax,* of fifty cents per pole per year *held* not unreasonable, though imposed on poles on private property, and railroad right of way as well as in streets. *Id.*

23. *Gas Rate.* Finding that no rate yielding as much as 6 per cent. could be deemed confiscatory disapproved, where 8 per cent. shown as lowest rate on capital in other business and legal rate in State is 7 per cent. *Lincoln Gas Co.* v. *Lincoln* 256

24. *Id.* Not *held* confiscatory in absence of actual and timely test of practical operation. *Id.*

25. *Intrastate Passenger Rates; Testing Adequacy.* All parts of system within State should be embraced in computation. *Groesbeck* v. *Duluth &c. Ry.* 607

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26. *Id. Unremunerative Parts; Sleeping Car Service.* Not to be excluded or treated as separate operations. *Id.*

27. *Local Improvement Assessment.* Method of taxing property benefited, and manner of distribution (according to frontage, values or area), within legislative discretion. *Hancock* v. *Muskogee*. 454

28. *Condemnation.* Assessment of damages and determination of right of condemnation in separate proceedings consistent with due process. *Louis. & Nash. R. R.* v. *Western Union Tel. Co.* 363

29. *Id. For Telegraph*, existing as well as for new line. *Id.*

30. *Id.* Where for new line, state courts may reserve inquiry into alleged purpose to use it for existing line, in alleged infraction of state law, until use is attempted. *Id.*

31. *Id. On Railroad Right of Way; Judgment*, not void for failure to describe exact location of poles when it provides against interference with railroad and danger to persons or property. *Id.*

32. *Railroad Crossings; Safety Devices.* Railroad not deprived of property by change of law requiring it to share expense where another road crosses its tracks. *Northern Pac. Ry.* v. *Puget Sound Ry.* 332

33. *Railroad Tracks; Public Safety.* Requiring removal of a track, constructed under an ordinance grant, where it crossed thoroughfare. *Denver & Rio Grande R. R.* v. *Denver* 241

(4) *Equal Protection of the Laws.* See 5, 9, 17, 23, 24, *supra.*

34. *Inheritance Tax*, in cases of resident and nonresident decedents measurable in different ways. *Maxwell* v. *Bugbee* 525

35. *Id.* Question of equal protection must be decided between resident and nonresident decedents as classes, rather than by incidence of tax in particular cases. *Id.*

36. *Arizona Employers' Liability Law.* Confined to compensatory damages, and makes only such discrimination between employer and employee as necessarily arises from their different relations to common undertaking. *Arizona Employers' Liability Cases*. 400

37. *Telegraph Companies; Pole Tax.* That tax sought to be enforced against one company has not been enforced against

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others, does not prove denial of equal protection, in absence of arbitrary and intentionally unfair discrimination. *Mackay Tel. Co.* v. *Little Rock*. 94

(5) *Privileges and Immunities.* See VI; XI, 17, *supra.*

38. *Citizenship, Federal and State.* Distinction recognized; purpose not to transfer to Federal Government protection of civil rights inherent in state citizenship. *Maxwell* v. *Bugbee* 525

39. *Inheritance Tax.* It does not prevent state tax on privilege of inheritance from nonresident decedent of property within State. *Id.*

40. *Citizens and Residents. Quære:* Whether clause applies when discrimination in state inheritance tax law is based not on citizenship but on residence or nonresidence of decedent? *Id.*

XII. **Who May Question Constitutionality of Statutes.**

1. *Practical Operation and Effect,* determine. *American Mfg. Co.* v. *St. Louis* 459

2. *Party Affected.* Objection that Arizona Employers' Liability Law may be extended by construction to non-hazardous industries cannot be raised by parties whose industries are hazardous. *Arizona Employers' Liability Cases* 400

3. *Witnesses,* subpœnaed in grand jury investigation of violations of Corrupt Practices Act, may not question power of Congress to enact provisions for regulation of primary elections of candidates for office of United States Senator. *Blair* v. *United States* 273

4. *Party Affected.* This court will not pass upon constitutionality of act of Congress when party attacking it not entitled to raise question. *Id.*

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Agreement between States. See **Boundaries**, 2.
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Liberty of contract. *Id.*, VIII, 4.
Live stock; written claim of loss; when transportation ended. See **Interstate Commerce Acts**, 14, 15.
Indispensable parties, in action on joint contract. See **Parties**, 2.

1. *Breach; Damages.* Where owner of all shares of corporation, acting as its secret agent or as equitable owner of its property, contracts to convey this to a common venture, he may recover in his own name the full amount of the depreciation of the property resulting from the repudiation of the contract by the other parties to it, without any preliminary accounting or settlement of the corporate affairs. *Camp* v. *Gress* 308

2. *United States; Private Bailment on Naval Vessel.* Under Rev. Stats., § 1624, and § 1020, Navy Regulations, deposit of gold on war vessel creates no contract with United States. *Cartas* v. *United States* 545

3. *For Government Works; Rights of Third Parties.* Provision giving United States right on default to take materials, tools, etc., not applicable, *in invitum*, to property of third party used in the work. *Ball Eng. Co.* v. *White & Co* 46

4. *Id. Annulment.* Retention by Government of property of third party engaged in work, with knowledge of claim and without consent, followed by credit to defaulting contractor and lease of property to new contractor, *held* not to imply contractual liability against United States; having taken and used property, new contractor *held* liable for conversion. *Id.*

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Right of minority shareholders to affix trust on new shares acquired by majority through unfair reorganization. See **Equity**, 7–17; **Parties**, 3–5.
Right of shareholder, having contracted, as secret agent of corporation or equitable owner, to convey its property, to recover full depreciation due to breach. See **Contracts**, 1.

1. *Certificates of Stock.* Ordinarily regarded as "property;" situs for taxation at place other than owner's domicile. *De Ganay* v. *Lederer* 376

2. *United States as Shareholder; Dividends.* Collection of dividends on shares owned by United States is assertion of its right as creditor unaffected by relations as shareholder, and in suing therefor it acts in governmental capacity. *Ches. & Del. Canal Co.* v. *United States* 123

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1. *Forgery; Bills of Lading.* Congress may punish conspiracy to forge and utter or the forgery and utterance of bills of lading for fictitious shipments in interstate commerce. *United States* v. *Ferger* 199, 207

2. *Unlawful Rebates; Elkins Act.* What is "knowingly receiving." *Lehigh Coal & Nav. Co.* v. *United States* 556

3. *Self-Incrimination;* matter for defense at trial; does not go to probable cause in removal proceedings. *Rumely* v. *McCarthy* 283

4. *Trading-With-Enemy Act; Venue.* Failure to report to Alien Property Custodian is an offense committed in district where office is established. *Id.*

5. *Removal; Judge's Discretion.* Where defendant indicted in two districts, court of one may order removal to the other district under later indictment. *Id.*

6. *Severance.* Denial is within discretion of judge. *Stilson* v. *United States* 583

7. *Peremptory Challenges.* Jud. Code, § 287, providing that all defendants shall be treated as one for purposes of such challenges does not infringe right to impartial jury. *Id.*

8. *Instructions; General Knowledge of Jury.* Where jury instructed to consider publications and determine from them and other evidence whether they amounted to violations of Espionage and Draft Acts, related portions of charge, on right to call on their general knowledge, were not objectionable. *Id.*

9. *Instructions.* District judge not required to analyze or discuss details of evidence. *Id.*

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10. *Espionage and Selective Service Acts;* evidence of violation. *Id.*

11. *Indictment; Verdict; Sentence.* Evidence sustaining any one of several counts sustains verdict and judgment of guilty under all, if sentence does not exceed maximum allowable under any one. *Abrams* v. *United States* 616

12. *Espionage Act; Conspiracy.* Evidence sustaining conviction for uttering, etc., circulars intended to provoke resistance to United States in war and incite strike of workers in ammunition factories. *Id.*

13. *Id. Intent.* Scheme which necessarily involves defeat of war plans *held* to intend that result, notwithstanding ultimate purpose to prevent interference with Russian Revolution. *Id.*

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1. *Reliquidation; Time Limit.* Purpose of Act of 1874, providing that when duties have been liquidated and paid and goods delivered, the entry and settlement shall, after one year, in absence of fraud, etc., be conclusive, was to limit right to reliquidate. *Vitelli & Son* v. *United States* 355

2. *Fraud; Burden of Proof.* Where collector reliquidates for fraud, no presumption that his action was correct so as to cast onus of disproving fraud upon importer. *Id.*

3. *Id.* Fact that importer pays under protest and appeals to Board of General Appraisers, does not require him to assume burden of disproving fraud. *Id.*

4. *New Trial.* Where Court of Customs Appeals erroneously assumed that collector's action was correct, and cast burden of disproving fraud on importer, case remanded to be tried anew by Board of General Appraisers, without inquiry by this court into adequacy of evidence of fraud. *Id.*

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2. *Telegraph Lines.* Mississippi practice providing for assessment of damages and determination of right to condemn in separate proceedings. *Louis. & Nash. R. R.* v. *Western Union Tel. Co.* 363

3. *Id.* State may allow condemnation for existing as well as new line. *Id.*

4. *Id.* Where for new line, state courts may reserve inquiry into alleged purpose to use it for existing line, in alleged infraction of state law, until use is attempted. *Id.*

5. *Id. On Railroad Right of Way.* Judgment not void for failure to describe location of poles when it provides against interference with railroad and danger to persons or property. *Id.*

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2. Employee in charge of dump car used in filling in earth to replace trestle used in interstate commerce, and also employed to remove earth from between rails, *held* employed in interstate commerce. *Kinzell* v. *Chicago, Mil. & St. P. Ry.* 130

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2. *Id.* Duty of Secretary of Interior to protect *bona fide* occupant of railroad land. *Id.*

3. *Express Trust; Accounting; Laches.* Suit against city for accounting of improvement fund and alleging failure to sell lands assessed for benefits and to apply proceeds to satisfaction of improvement certificates, brought 17 years after repudiation of trust duties, *held* barred by laches. *Benedict* v. *City of New York* 321

4. *Id. Limitations.* Such action, *held* subject, if not to 6-year statute of limitations, then to 10-year statute governing bills for relief in cases of trust not cognizable in common-law courts. *Id.*

5. *Id.* In case of express trust, statute begins to run when trust is repudiated. *Id.*

6. *Id. Federal Courts.* Not bound by state statutes of limitations, in equity, but guided by them in determining action on stale claims. *Id.*

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7. *Suit by Shareholders; Laches.* Delay of 22 years by minority in seeking to affix trust on shares in new corporation held by majority not laches where plaintiffs or others representing minority had been diligent in attacking foreclosure and reorganization proceedings through which such shares were acquired. *Southern Pac. Co.* v. *Bogert* 483

8. *Id. Class Suits.* When action is such that suit may be by plaintiff and all persons similarly situated, intervention by each person not necessary to avoid laches. *Id.*

9. *Id. Estoppel; Election.* Judgments against minority shareholders in suits to set aside foreclosure and reorganization agreement as fraudulent are no estoppel by either *res judicata* or election against further suit to declare majority shareholder trustee of new shares taken under new organization. *Id.*

10. *Fiduciary Duty of Majority Shareholder.* When majority shareholder not banker or underwriter, in relation to minority, so as to relieve of fiduciary duty to them in respect of new shares. *Id.*

11. *Id.* Majority exercising control are trustees for minority where control exercised by corporation through subsidiary over third corporation of which subsidiary is majority shareholder. *Id.*

12. *Id.* Duty of majority shareholder to share fruits of control with minority is fiduciary; not dependent on fraud or mismanagement *Id.*

13. *Id.* Fact that floating debts of old company were not provided for in reorganization does not bar relief to minority in action to hold majority shareholder as trustee. *Id.*

14. *Id. Contribution.* Majority shareholder allowed compensation for satisfaction of floating debts of old company, so far as new shares to be received by minority are thereby increased in value. *Id.*

15. *Id.* Claim of such compensation *held* not too late when made before final decree and delay not prejudicial to plaintiffs. *Id.*

16. *Id.* Such contributions may consist in payments by majority shareholder directly, or in effect by it through its subsidiary corporation. *Id.*

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17. *Id.* In determining amounts of such contributions and extent to which minority benefited, judgments on floating debts against old company no bar to consideration of other relevant facts. *Id.*

18. *Injunction.* One not subjected to jurisdiction in action *in personam* in another State cannot enjoin its prosecution. *Pell* v. *McCabe* 573

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2. *Id. Payment of Dividends.* Evidence sufficient to show dividends, sued for by Government many years after declared, were never paid. *Id.*

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3. *Good Faith.* Under indictment for "knowingly" receiving rebates in violation of Elkins Act, defendant entitled to prove allowances were accepted in honest belief that they were sufficiently described in and justified under tariffs filed with Interstate Commerce Commission after Hepburn Act of 1906, which were accepted and not objected to by Commission. *Lehigh Coal & Nav. Co.* v. *United States* 556

4. *Patent Infringement.* That respondent's process was inefficient and wasteful as compared with that of petitioner's patent is pertinent to question of infringement. *Minerals Separation* v. *Butte & Superior Co.* 336

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3. *Id. Negligence.* Wilful failure to attend meetings and supervise affairs of bank renders director liable for loss resulting from mismanagement by executive officers. *Id.*

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5. *Id. Proceedings to Enforce.* Where bill charged both statutory and common-law liability, and defendant obtained dismissal on plaintiff's proofs and Court of Appeals reversed and directed decree against him on ground that common-law liability was established, defendant not entitled to new trial on ground that that issue was not considered as involved in District Court. *Id.*

6. *Id. When Responsibility Continues.* Director remains responsible as such in absence of evidence that he has resigned or refused to qualify when reëlected. *Id.*

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7. *Mental Conception*, in process of development, occasionally outlined on scraps of paper, subsequently discarded, and roughly worked into small model, not invention. *Id.*

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11. *Id.* Invention must be particularly pointed out and distinctly claimed; patent cannot be extended beyond claims. *Id.*

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8. *Id. Motion for Directed Verdict.* By defendant, at conclusion of testimony, not equivalent to demurrer to evidence.

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3. *Judgment Absolute or New Trial.* Where bill charging both statutory and common-law liability was dismissed on plaintiff's proofs, and Court of Appeals directed decree against defendant on ground that common-law liability was established, defendant not entitled to new trial on ground that issue was not considered as involved in District Court. *Bowerman* v. *Hamner* 504

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6. *Id. Erroneous Patent.* Issued for such lands, as place lands, gave to railroad only legal title, leaving equitable title in United States. *Id.*

7. *Id. Possession under State.* Possession, cultivation, etc., under conveyance from State based on unapproved selection as swamp lands, conveys no title. *Id.*

8. *Id. Protecting Possession.* Lands being claimed by individual under Swamp Land Act, and by railroad under lieu selections, courts cannot anticipate adjudication by Land Department, beyond protecting possession lawfully acquired. *Id.*

9. *Id. Questions for Land Department.* Whether lands come within Swamp Land Act and whether so occupied and appropriated as not to be subject to lieu selection by railroad. *Id.*

10. *Id. Discretion of Secretary.* Approval of lieu selection involves exercise of discretion. *Id.*

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11. *Id.* He may reject selection and hold title in United States for *bona fide* occupant, who has reclaimed and improved at large cost. *Id.*

12. *Id. Limitations.* Where land claimed by individual under Swamp Land Act was patented pending suit to railroad under lieu selection, occupant can not avail of statute of limitations or attack patent collaterally. *Id.*

13. *Id. Reconveyance; Acceptance.* Where railroad reconveys land erroneously patented as place lands and selects them as lieu lands, fact that land officers entertain selections and pass one of them to patent establishes acceptance of reconveyance by United States. *Id.*

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3. *Id.* In view of establishment of Board and Corporation as government agencies, broadly empowered and definitely restricted under Shipping Act, and of mention of that act in Act of 1917, presumed that Congress expected they would be used under latter act, and that President, in employing them thereunder, did so because of powers and restrictions, already provided. *Id.*

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5. *Id. Charter.* Words "purchased, chartered, or leased," cover contract for temporary use of vessel or its services not amounting to demise. *Id.*

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